

No. 12499

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United States  
Court of Appeals  
For the Ninth Circuit.

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PENNSYLVANIA SALT MFG. CO., of Washing-  
ton, a Corporation,

Appellant,

vs.

OSCAR VIRGIL HAYNES,

Appellee.

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Transcript of Record

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Appeal from the United States District Court  
Western District of Washington,  
Northern Division.

FILED

APR 25 1950

PAUL P. O'BRIEN, V.  
OLE



No. 12499

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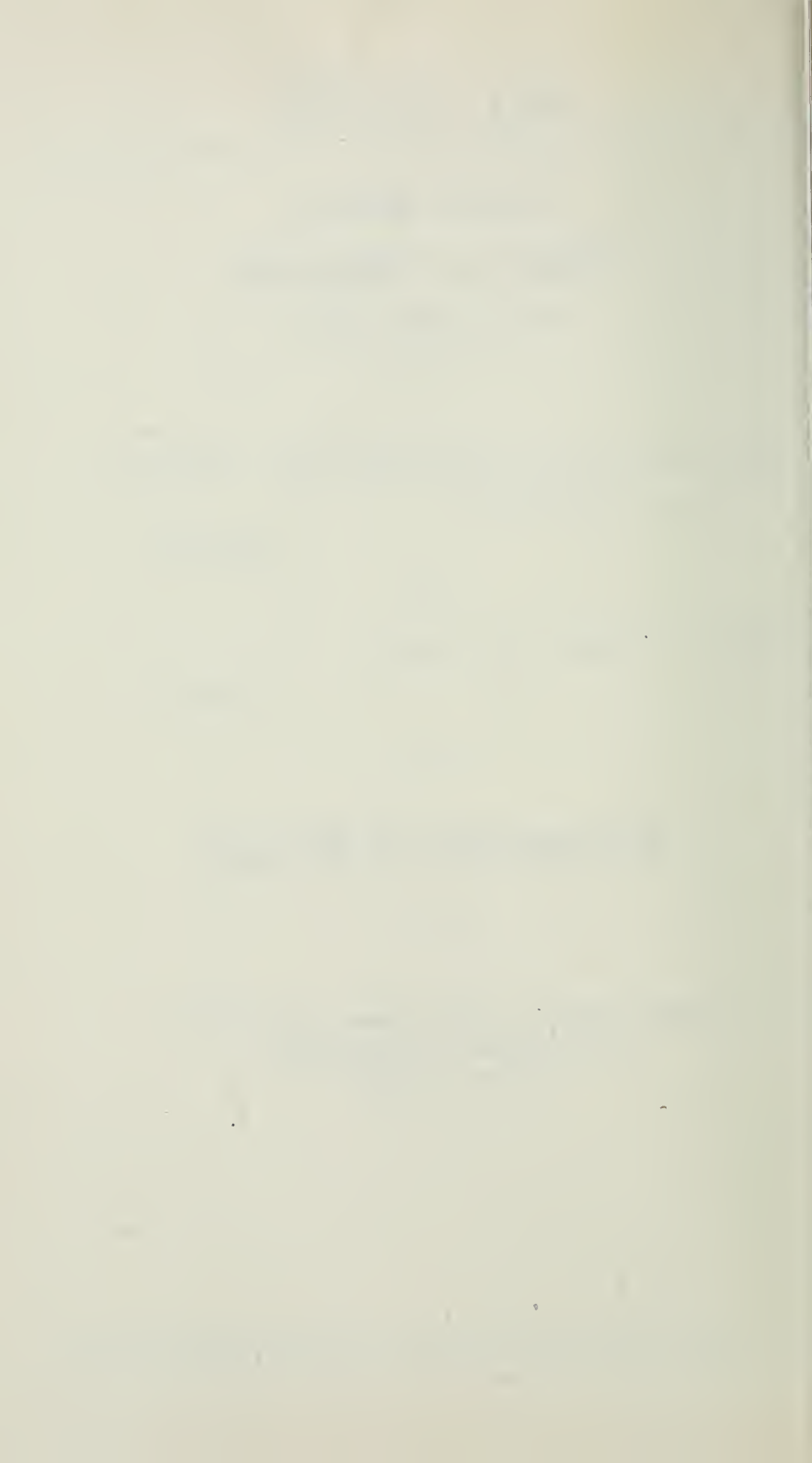
Appellee.

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Transcript of Record

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Appeal from the United States District Court  
Western District of Washington,  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF COUNSEL

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STARIN, of MESSRS. THORGRIMSON &  
HOROWITZ,

2000 Northern Life Tower,  
Seattle 1, Washington.

Attorneys for Appellant.

MR. A. L. MASLAN, MR. BEN MASLAN and  
MR. ALBERT HANAN, of MESSRS. MAS-  
LAN, MASLAN & HANAN,

226 Second & Cherry Building,  
Seattle 4, Washington.

Attorneys for Appellee.

In the District Court of the United States for  
the Western District of Washington, Northern  
Division

No. 2096

OSCAR VIRGIL HAYNES,

Plaintiff,

vs.

PENNSYLVANIA SALT MFG. CO., of Washing-  
ton, a Delaware corporation,

Defendant.

### COMPLAINT

Comes now the plaintiff and for cause of action  
alleges as follows:

#### I.

That the defendant is a corporation organized  
under the laws of the State of Delaware and as such  
is a citizen of the State of Delaware. That the de-  
fendant is qualified to do business in the State of  
Washington as a foreign corporation, and that the  
duly constituted and appointed resident agent of  
the defendant in the State of Washington is Mar-  
shall Chandler, residing in Seattle, King County,  
State of Washington.

#### II.

That the plaintiff is an individual and a citizen  
of the United States domiciled in the City of  
Seattle, County of King, State of Washington, and  
a citizen of the State of Washington.

## III.

That the defendant is, and was at all times hereinafter mentioned, in the business of manufacturing chemicals and that at all times hereinafter mentioned, it maintained and operated a manufacturing plant in Tacoma, Washington, where it produced and processed chemicals. That at all times hereinafter mentioned and for several years prior thereto the defendant, in the manufacturing and processing of chemicals in its said plant in Tacoma, Washington, through its employees, handled many chemicals capable of causing burns and severe injuries to persons coming in contact with the said chemicals. That in the maintenance of its chemical manufacturing plant the defendant, at all times hereinafter mentioned and for several years prior thereto, used a great deal of iron pipes of various forms and sizes through which the defendant ran various types of chemicals in the manufacturing and processing of chemicals. That as said pipes became worn, they were discarded as a part of the defendant's manufacturing and operating system and replaced by other pipes.

## IV.

That during February, 1948, the defendants sold certain scrap iron to Frank Powser of Tacoma, Washington. That included among the scrap iron sold to Frank Powser of Tacoma, Washington, was a large coil of pipe which the defendant had discarded from its operating system. That during

February, 1948, employees of Frank Powser went to the Tacoma, Washington, plant of the defendant to accept delivery of the scrap iron sold to Frank Powser. That an employee of the defendant, acting in the course and scope of his employment, delivered the scrap iron, which had been sold to Frank Powser, including the said coil of pipe, to employees of Frank Powser, who then loaded the scrap iron, including the said coil of pipe onto a truck which they had brought for that purpose, and transported it to the salvage yard of Frank Powser in Tacoma, Washington. That upon arrival at the salvage yard of Frank Powser, the scrap iron, including the said coil of pipe, was deposited in the Powser yard. That at all times herein mentioned, the said coil of pipe contained a corrosive chemical substance, which the plaintiff believes was sulphuric acid. That neither the defendant nor any of his employees knew that the said coil of pipe contained said corrosive chemical substance.

#### V.

That on the 20th day of February, 1948, the plaintiff was employed in the capacity of a truck driver by B. Radinsky & Son, salvage dealers, of Seattle, Washington. That in the course of his employment, the plaintiff, from time to time, was directed by his employer to proceed to various places to transport scrap metals from the said localities to the salvage yard of B. Radinsky & Son located in Seattle, Washington. That on February



20, 1948, plaintiff was directed by his employer to proceed to the salvage yard of Frank Powser in Tacoma, Washington, to pick up a load of scrap iron and scrap pipe. That the plaintiff, in a truck owned by his employer, proceeded to the salvage yard of Frank Powser as directed and after arriving there, was shown by employees of Frank Powser, the scrap iron and scrap pipe which he was to load on his truck and transport to his employer's yard in Seattle. That among the scrap iron to be loaded was the said coil of pipe hereinbefore mentioned. That the said coil of pipe was lying on the ground in the salvage yard of Frank Powser in the same place and in the same position as it had been when first deposited in the said yard by employees of Frank Powser at the time that they had transported it from the defendant's manufacturing plant, as hereinbefore set forth. That the plaintiff was at all times unaware that the said coil of pipe contained a corrosive substance. That by means of a hoist, the plaintiff loaded said coil of scrap pipe from the ground onto the truck which he had driven to the Powser yard for the purpose of transporting said scrap iron. That for the purpose of placing the said coil of pipe in a proper position on the truck and in order to move it a few inches, the plaintiff, using a maul, pounded on said pipe when, without warning or notice to the plaintiff, a seam in said pipe opened and a pressurized stream of the corrosive chemical substance which was in the said coil of

pipe issued from the said coil of pipe and struck the plaintiff on the face, arms, neck and eyes and covered a large portion of his clothing. That the force with which the corrosive chemical substance spewed from the said coil of pipe knocked the plaintiff from the truck to the ground. That the plaintiff was immediately rushed to the Tacoma Hospital, Tacoma, Washington, where he was forced to remain for two months and two days.

## VI.

That the said corrosive chemical substance which issued from the said coil of pipe as hereinbefore set forth, upon coming into contact with the plaintiff's eyes, burnt them to such an extent that the plaintiff has suffered complete loss of vision in the left eye and almost total loss of vision of the right eye; and upon coming in contact with the rest of plaintiff's person, caused severe burns which have resulted in multiple scars, disfiguring the greater portion of plaintiff's face and neck and a portion of his arms. That the said injuries to the plaintiff have caused, and are still causing, the plaintiff excruciating pain and extreme mental anguish and suffering. That the scars on plaintiff's face and body are extremely tender and continue to reopen, causing him continuous pain. That the plaintiff has been receiving medical treatment since the said injuries. That it will be necessary for him to receive medical treatment for an indefinite period. That the said injuries were caused by and are a

direct and proximate result of the negligence of the defendant and its employees.

## VII.

That the said negligence of the defendant consisted of the following:

a. Failing to ascertain that all corrosives and substances injurious to other persons upon contact had been removed from said coil of pipe or neutralized before allowing said coil of pipe to be removed from the premises of the defendant to be placed as scrap metal into the stream of commerce where it was certain to be handled by other persons unaware of its dangerous propensities.

b. Failing to remove all corrosives and substances injurious to humans from said coil of pipe immediately upon removing said coil of pipe from its operating system.

c. Selling and delivering a coil of pipe containing a corrosive substance highly injurious to other persons upon contact, without having warned the persons to whom the said pipe was sold and delivered, of the presence of dangerous substances in said coil of pipe.

## VIII.

That prior to the injuries sustained by plaintiff as a result of defendant's negligence, as hereinbefore set forth, the plaintiff was a strong and able bodied man in good health with excellent vision, earning and capable of earning the sum of \$300.00

per month. That as a direct and proximate result of the negligence of the defendant as above set forth, the plaintiff has become totally and permanently disabled. That as a result of the negligence of the defendant above set forth, the plaintiff has suffered damages in the sum of \$250,000.00.

### IX.

That plaintiff has been forced to expend for medical services, and is still being treated by doctors for his injuries, and will be forced to expend large sums in the future for medical and hospital bills.

Wherefore, plaintiff prays for judgment against the defendant as follows:

1. For damages in the sum of \$250,000.00 against the defendant, Pennsylvania Salt Manufacturing Co. of Washington, a Delaware corporation.
2. For such hospital and medical bills as may be proven at the trial.
3. For his costs and disbursements incurred in this action.

MASLAN & MASLAN,  
By /s/ A. L. MASLAN,  
Attorneys for Plaintiff.

Plaintiff respectfully demands a jury trial having elected to have his case tried by a jury.

/s/ A. L. MASLAN.

[Endorsed]: Filed September 15, 1948.

[Title of District Court and Cause.]

STIPULATION ALLOWING AMENDMENT  
TO COMPLAINT

It is hereby stipulated by and between the parties hereto through their respective counsel of record that the following sentence in Paragraph IV of plaintiff's complaint, reading as follows:

“That neither the defendant nor any of his employees knew that the said coil of pipe contained said corrosive chemical substance.

be deemed amended to read:

“That neither the said Frank Powser, nor any of his employees knew that the said coil of pipe contained said corrosive chemical substance.”

and that defendant's answer to said Paragraph IV be deemed amended to deny said amended allegation for want of sufficient knowledge or information.

MASLAN & MASLAN,

By /s/ A. L. MASLAN,

Attorneys for Plaintiff.

PRESTON, THORGRIMSON &  
HOROWITZ,

/s/ FRANK M. PRESTON,

Attorneys for Defendant.

[Endorsed]: Filed November 26, 1948.



[Title of District Court and Cause.]

## ANSWER

Comes now the defendant and for answer to the complaint of the plaintiff herein admits, denies, and alleges as follows:

### I.

Answering paragraphs I and II of said complaint, defendant admits the allegations therein contained.

### II.

Answering the allegations of paragraph III of said complaint, the defendant admits that at all times mentioned in the complaint, it maintained and operated a manufacturing plant in Tacoma, Washington, and that in the operation of said plant it used iron pipes and that as said pipes became worn they were discarded and replaced, but the defendant denies each and every other allegation contained in said paragraph.

### III.

Answering paragraph IV of said complaint, the defendant admits that during February, 1948, it sold certain scrap iron to Frank Powser of Tacoma, Washington, including a large coil of pipe which the defendant had discarded from its operating system, and further admits that an employee of the defendant delivered said scrap iron, including said coil of pipe, to employees of said Frank Powser

at the plant of the defendant, and further admits that neither the defendant nor any of its employees knew that the said coil of pipe contained any corrosive chemical substances, but the defendant does not have any knowledge or information concerning the disposition or whereabouts of the said scrap iron or coil of pipe after the same left the defendant's plant.

#### IV.

Answering paragraph V of said complaint, the defendant admits that on and prior to the date therein mentioned the plaintiff was employed in the capacity of a truck driver by B. Radinsky & Son, salvage dealers of Seattle, Washington, and that on or about said day the plaintiff was directed by his employer to pick up a load of scrap iron and scrap pipe at the salvage yard of Frank Powser in Tacoma, Washington, and further admits that the plaintiff proceeded to said salvage yard of Frank Powser as directed, in a truck owned by his employer, and further admits that while in the act of loading the coil of scrap pipe which had been acquired by the said Frank Powser from the defendant as aforesaid, the plaintiff sustained injuries, the scope and extent of which are unknown to the defendant, but the defendant has no knowledge or information sufficient to form a belief as to the other allegations contained in said paragraph V and therefore denies the same.

compensation and industrial insurance. (R.R.S. 7675.)

And for a Further and Second Affirmative Defense to the cause of action set forth in the plaintiff's complaint, the defendant alleges:

I.

That any injuries which may have been sustained by the plaintiff as a result of the handling of the aforesaid coil of pipe were directly and proximately contributed to by plaintiff's own negligence and carelessness.

Wherefore, the defendant having fully answered plaintiff's complaint, prays that the plaintiff's action be dismissed, that the plaintiff take nothing herein, and that the defendant have judgment against the plaintiff for the costs and disbursements of this action.

PRESTON, THORGRIMSON &  
HOROWITZ,  
/s/ FRANK M. PRESTON,  
Attorneys for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed February 18, 1949.



[Title of District Court and Cause.]

DEFENDANT'S REQUESTED  
INSTRUCTIONS

Comes now the defendant and requests the court to instruct the jury in writing as follows:

PRESTON, THORGRIMSON &  
HOROWITZ,  
/s/ FRANK M. PRESTON,  
Attorneys for Defendant.

Instruction No. ....

Members of the Jury:

You are instructed to return a verdict into court in favor of the defendant.

Instruction No. ....

You Are Instructed that the gist of this action is alleged negligence on the part of the defendant. Plaintiff is not entitled to recover against defendant merely because an accident has caused him injuries, but must prove by a fair preponderance of the evidence in the case that the defendant was negligent in one or more of the particulars charged in plaintiff's complaint, and that such act or acts of negligence was a proximate cause of the accident in question and the resulting injuries to plaintiff, failing in which your verdict must be for the defendant.

## Instruction No. ....

By the term "proximate cause" of an event is meant that cause which in a natural and unbroken sequence produces the event and without which such event would not have occurred. Thus an injury that is the natural and probable consequence of an act of negligence is the proximate result of such act, but such act is not the proximate cause of an injury which could not have been foreseen or reasonably anticipated as the probable result of the act.

## Instruction No. ....

You are instructed that if you find from a preponderance of the evidence in the case that the plaintiff in striking the pipe coil in question with a maul did not use reasonable care in so doing for his own protection and well-being, and that such failure on his part directly and proximately contributed to cause the accident and his resulting injuries, then plaintiff cannot recover and your verdict must be for the defendant, regardless of whether or not the defendant was also negligent.

## Instruction No. ....

You are instructed that the plaintiff, in order to prevail in this action must prove by the evidence or reasonable inference therefrom that defendant was negligent in one or more of the particulars charged in plaintiff's complaint.

If in order to find an act of negligence on the

part of defendant you are required to resort to speculation, surmise, or conjecture, then plaintiff cannot recover, and your verdict must be for the defendant.

Instruction No. ....

You are instructed that if you find from the evidence that the defendant could not reasonably have foreseen that any person handling, moving, or supporting said coil of pipe would use a maul or hammer to strike the same and break a hole therein, and if you further find that the proximate cause of the plaintiff's injuries was the striking of a hammer or maul upon the coil of pipe, then your verdict must be for the defendant.

Instruction No. ....

You are instructed that if you find from the evidence that the injuries to the plaintiff would not have occurred if the plaintiff had not attempted to knock off a protruding T connection on the coil of pipe with a hammer or maul, and if you find that the striking of the hammer or maul on the coil of pipe was the act which proximately and directly caused the injuries, then your verdict must be for the defendant.

Instruction No. ....

You are instructed that if you find from the evidence that at the time of the delivery of the coil of pipe to employees of Frank Powser, the em-

ployees of the defendant did not know of the existence of any dangerous or injurious substance contained in said pipe, and if you find from the evidence that in the exercise of ordinary care the defendant's employees would not have known of the presence of any such injurious substance, then your verdict should be for the defendant.

[Endorsed]: Filed November 23, 1949.

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District Court of the United States, Western  
District of Washington, Northern Division

No. 2096

OSCAR VIRGIL HAYNES,

Plaintiff,

vs.

THE PENNSYLVANIA SALT MFG. CO. of  
Washington, a Delaware Corporation,  
Defendant.

### VERDICT

We, the jury in the above-entitled cause, find for the plaintiff and against the defendant and assess plaintiff's amount of recovery in the sum of (\$35,000.00) Thirty-Five Thousand no/100 Dollars.

/s/ WALTER B. LATIMER,  
Foreman.

[Endorsed]: Filed November 25, 1949.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL OF ONE ISSUE

Comes now the defendant above named and moves the court herein for a new trial of the issue, and solely of the issue, raised by defendant's first affirmative defense in its answer on file herein, to wit: the right of plaintiff to maintain this action under Section 7675 of Remington's Revised Statutes of Washington.

The grounds assigned for this motion are as follows:

1. Error on the part of the trial court in granting plaintiff's motion to strike first affirmative defense of defendant's answer, thereby withdrawing the issue from consideration of the jury.

2. Error on the part of the trial court in excluding proof offered by defendant in support of the allegations of its said first affirmative defense.

PRESTON, THORGRIMSON &  
HOROWITZ,

/s/ FRANK M. PRESTON,

Attorneys for Defendant.

The foregoing motion for new trial is hereby denied.

Done in open Court this 12th day of December, 1949.

/s/ JOHN C. BOWEN,

Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed December 12, 1949.

In the District Court of the United States for the  
Western District of Washington, Northern  
Division

No. 2096

OSCAR VIRGIL HAYNES,

Plaintiff,

vs.

PENNSYLVANIA SALT MFG. CO. of Wash-  
ington, a Delaware Corporation,

Defendant.

### JUDGMENT

This matter having come on regularly for trial before the Hon. John C. Bowen, Judge of the above entitled Court, the plaintiff appearing in person and through his attorneys, Maslan, Maslan & Hanan and the defendant appearing through its attorneys, Preston, Thorgrimson & Horowitz (by Frank Preston and Edward Starin of counsel), and the jury having been duly paneled and sworn and witnesses having been sworn, and evidence having been heard and the jury having returned a verdict in open Court in favor of the plaintiff for \$35,000.00, and the Court having directed judgment upon the verdict to be entered forthwith by the clerk of said Court and the said judgment having been entered in the civil docket of the Court on November 28, 1949, now, therefore, it is hereby

Ordered, Adjudged and Decreed that the plain-

tiff, Oscar Virgil Haynes have and recover judgment against the defendant, Pennsylvania Salt Mfg. Co. of Washington, a Delaware corporation, in the sum of \$35,000.00, with interest thereon at the legal rate from the 28th day of November, 1949.

It is further Ordered, Adjudged and Decreed that plaintiff have and recover his costs herein to be taxed by the Court.

To all of which defendant excepts and its exceptions are hereby noted.

Done in open Court this 12th day of December, 1949.

/s/ JOHN C. BOWEN,  
Judge.

Presented and approved by  
ALBERT HANAN,  
Of MASLAN, MASLAN & HANAN,  
Attorneys for Plaintiff.

Approved as to form:

.....

Of Preston, Thorgrimson & Horowitz, Attorneys for  
Defendant.

Receipt of copy acknowledged.

Entered in Civil Docket December 12, 1949.

[Endorsed]: Filed December 12, 1949.



[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE UNITED  
STATES COURT OF APPEALS

To: The Clerk of the above entitled Court, the plaintiff above named and to Maslan, Maslan and Hanan, his attorneys:

Notice is Hereby Given that the Pennsylvania Salt Mfg. Co., of Washington, a Delaware corporation, the defendant above named, does hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on December 12, 1949.

/s/ FRANK M. PRESTON,  
PRESTON, THORGRIMSON &  
HOROWITZ,

Attorneys for Appellant Pennsylvania Salt Mfg.  
Co. of Washington, a Delaware corporation.

[Endorsed]: Filed December 23, 1949.



[Title of District Court and Cause.]

### APPEAL BOND

Known All Men by These Presents, That Pennsylvania Salt Mfg. Co. of Washington, a Delaware Corporation, as Principal, and American Surety Company of New York, a corporation organized and existing under the laws of the State of New York and duly authorized to do a surety business in the State of Washington, as Surety, are held and firmly bound unto Oscar Virgil Haynes, the above named Plaintiff, in the full and just sum of Two Hundred Fifty and no/100 (\$250.00) Dollars to be paid to the said Oscar Virgil Haynes, his heirs, executors, administrators, or assigns, to which payment well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally by these presents.

Signed and Dated this 23rd day of December, 1949.

Whereas, lately at a regular term of the District Court of The United States for the Western District of Washington, Northern Division, in a suit pending in said Court between Oscar Virgil Haynes, as Plaintiff, and Pennsylvania Salt Mfg. Co. of Washington, being cause No. 2096 on the law docket of said Court, judgment was rendered against the said Pennsylvania Salt Mfg. Co. of Washington, a Delaware Corporation, and

Whereas, the said Pennsylvania Salt Mfg. Co. of Washington has been allowed an appeal

Now, The Condition of the Above Obligation Is Such,

That if the said Pennsylvania Salt Mfg. Co. of Washington shall pay all costs and expenses which may be awarded against it, then the above obligation to be void; otherwise to remain in full force and effect.

PENNSYLVANIA SALT MFG.  
CO. OF WASHINGTON, a  
Delaware Corporation.

By PRESTON, THORGRIMSON &  
HOROWITZ,

Its Attorneys.

AMERICAN SURETY COM-  
PANY OF NEW YORK,

By /s/ J. A. HODSON,  
Resident Vice Pres.

Attest:

[Seal] /s/ M. WEYER,  
Resident Asst. Secretary.

[Endorsed]: Filed December 23, 1949.

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[Title of District Court and Cause.]

ORDER ENLARGING TIME TO FILE  
TRANSCRIPT OF RECORD ON APPEAL

This matter coming on before the court on application of the defendant Pennsylvania Salt Mfg. Co. for an order enlarging and extending the time for

filing the record on appeal and docketing this cause with the Clerk of the U. S. Court of Appeals for the Ninth Circuit, the applicant appearing by its attorneys, Frank M. Preston, Esq., and Preston, Thorgrimson & Horowitz, and it appearing that due and timely notice of said application was given to Messrs. Maslan, Maslan & Hanan, attorneys for the plaintiff herein; and it further appearing to the court from the records and files herein that notice of appeal was filed in this cause on December 23, 1949; and it further appearing that good cause exists for extending and enlarging the time for filing the record on appeal and docketing the same with the clerk of the U. S. Court of Appeals for the Ninth Circuit, and the court being fully advised in the premises,

It Is Hereby Ordered that the time for filing the record on appeal and docketing the same in the above entitled cause be, and the same is hereby extended to and including March 15, 1950.

Done in open court this 6th day of January, 1950.

/s/ JOHN C. BOWEN,

Judge.

Presented by:

/s/ EDWARD STARIN,

Of Counsel for Defendant.

[Endorsed]: Filed January 6, 1950.

In the District Court of the United States for the  
Western District of Washington, Northern  
Division

No. 2096

OSCAR VIRGIL HAYNES,

Plaintiff,

vs.

PENNSYLVANIA SALT MFG. CO. of Washing-  
ton, a Delaware Corporation,

Defendant.

Before: The Honorable John C. Bowen,  
District Judge.

TRANSCRIPT OF PROCEEDINGS AT TRIAL

Seattle, Washington; November 22, 1949  
10 o'Clock A.M.

Appearances:

A. L. Maslan, Ben Maslan and Albert Hanan,  
Maslan, Maslan & Hanan, appearing for and on  
behalf of plaintiff.

Frank M. Preston and Edward Starin, Preston,  
Thorgrimson & Horowitz, appearing for and on be-  
half of defendant.

Whereupon, a jury having been duly impanelled,  
and opening statement made on behalf of plaintiff,  
the following proceedings were had and done, to  
wit:

The Court: Call plaintiff's first witness.

GEROLD WALTERS

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows: [2\*]

Direct Examination

By Mr. A. L. Maslan:

Q. What is your name, please?

A. Gerold Walters.

Q. What is your occupation?

A. I am a photographer.

Q. Where are you located in the city of Seattle?

A. 310—Fourth and Pike Building.

Q. Is that your business? A. Yes.

Q. What is the name of the business?

A. Walters Studio.

Q. Are you associated with anyone?

A. Yes, with my father.

Q. Do you recall, Mr. Walters, on or about the 6th day of July, 1948, when you took certain pictures? A. Yes.

Q. In whose company were you when you took these pictures?

A. I was in your company.

Q. Where were those pictures taken?

A. Right near Tacoma at a junk yard.

Q. Did you take the pictures of any particular object?

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\* Page numbering appearing at bottom of page of original Reporter's Transcript.

(Testimony of Gerold Walters.)

A. Yes, there was a piece of a sort of pipe on the ground and we photographed that pipe. [3]

Q. And these pictures were taken in my presence; Mr. Walters? A. Yes.

(Photographs marked Plaintiff's Exhibits 1, 2, 3 and 4 for identification.)

Q. Referring to Exhibits 1, 2, 3 and 4, did you take those pictures? A. Yes.

Q. What do they represent?

A. A picture of the pipes that were lying on the ground in this yard.

Mr. A. L. Maslan: I offer those in evidence, may it please the Court.

Mr. Preston. We object at this time, Your Honor. There is no connection shown yet between these photographs.

The Court: The Court will hear further testimony identifying them.

Q. On the same day, did you have occasion to take any pictures of this lad here? Will you stand up, Oscar? A. Yes.

Q. What day was that?

A. The same day that these pictures were taken. [4]

Q. You stated that was July 6, 1948?

A. July 6, 1948, that's right.

(Photographs marked Plaintiff's Exhibits 5 and 6 for identification.)

(Testimony of Gerold Walters.)

Q. And you state those pictures were taken the same date as you took the other pictures?

A. Yes, sir.

Q. What date was that again?

A. July 6, 1948.

Q. Those are of this young man here?

A. Yes.

Mr. A. L. Maslan: I offer those in evidence, may it please Your Honor.

The Court: Plaintiff's Exhibits 5 and 6 are now admitted.

(Plaintiff's Exhibits 5 and 6 received in evidence.)

The Court: They may be passed now or later to the jury. You will have an opportunity to do that at any time.

Mr. Ben Maslan: I wonder if they may be passed at this time, Your Honor.

The Court: You may do that. The jury is given an [5] opportunity to have a view of these at this time, having in mind that you will later have an opportunity to study them in greater detail at your own leisure and convenience in the course of your deliberations in the jury room.

At this time, you should pass them along promptly so as not to unnecessarily delay the trial proceedings at this moment. Pass them along as promptly as you can after getting a view of the objects shown in the photographs.



(Testimony of Gerold Walters.)

Q. Mr. Walters, at the time you took the pictures of Oscar Haynes, did you have occasion to observe the physical condition of the young man at that time, that is, the facial condition?

A. Of course, he looked very bad, and I didn't know any of the circumstances of—

The Court: Never mind that. Just say what your eyes reflected to your mind about his appearance.

The Witness: He looked very bad. He had been burned.

Mr. Preston: I object to that.

The Court: The objection is sustained. If you saw something on his face, you can say what you saw on his face.

Q. Do those pictures accurately represent the physical [6] condition of the plaintiff as you observed him on the day you took the pictures?

A. At the time I took the photographs, yes. They are not retouched, just a raw negative was made, and a print made from that negative without any retouching on it.

The Court: That is sufficient. Have in mind the form of the question and answer that. If counsel wishes to go further, he may inquire.

Q. As you observed his face, did you notice any matter or material exuding from any scars or sores on the face at that time?

A. Well, frankly—

The Court: Can't you say yes or no, and then



(Testimony of Gerold Walters.)

he may ask you another question? Can't you say yes or no to that question? Read the question.

(Last question read by reporter.)

Mr. Preston: It is leading and suggestive, if the Court please.

The Court: The objection is overruled, with direction to the witness to answer either yes or no, according as he knows the fact to be.

The Witness: No.

Q. Mr. Walters, do you recall the pictures that you took of the pipe on July 6, 1948?

A. Yes. [7]

Q. Did you subsequently take any other pictures of the same pipe? A. Yes.

Q. Is there any reason why you took the later pictures?

A. In the first pictures that were taken, grass seemed to be grown around the pipe quite a bit, and so we thought it would be better to take some newer pictures, and perhaps get a better view without as much grass around the pipe, and showing it off to better advantage.

Q. Did you then take some pictures?

A. Yes.

Q. When did you take them?

A. They were taken yesterday.

Q. Where were they taken?

A. At the same place, near Tacoma, at this junk yard.

(Testimony of Gerold Walters.)

Q. And is that the Frank Powser Junk Yard where you were before with me?

A. That's right.

(Photographs marked Plaintiff's Exhibits 7, 8, 9 and 10 for identification.)

Q. Are those the pictures that you took yesterday? A. Yes. [8]

Q. Do those represent the pipe as you saw the said pipe yesterday? A. Yes.

Mr. A. L. Maslan: I offer those in evidence.

Mr. Preston: Objection.

Mr. A. L. Maslan: We will connect them up later.

The Court: The Court will reserve ruling.

Mr. A. L. Maslan: Take the witness.

Mr. Preston: No questions.

The Court: You may step down.

(Witness excused.)

The Court: Call plaintiff's next witness.

Mr. A. L. Maslan: Frank Powser.

### FRANK POWSER

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. A. L. Maslan:

Q. What is your name, please?

(Testimony of Frank Powser.)

A. My name is Frank Powser.

Q. Where do you live? [9]

A. I live at 315 North Yakima, Tacoma.

Q. What is that address?

A. 315 North Yakima, Tacoma.

Q. What business are you in?

A. I am in the junk business.

Q. And what does that entail, the junk business?

A. Scrap iron, rags, and so on, metal and all down the line.

Q. Where do you do business, primarily?

A. I do business at Reynold and Lincoln Avenues, Tacoma.

Q. What type of plant or operation do you have?

A. I buy and sell. I sell all over and buy scrap and sell it all over.

Q. Did you ever have occasion to purchase any scrap iron from the Pennsylvania Salt Company?

A. Yes, I did.

Q. Do you recall ever having purchased any scrap iron from the Pennsylvania Salt Company during the month of February, 1948?

A. Yes, I did.

Q. Do you recall the date of the accident, Mr. Powser, wherein Oscar Haynes was injured?

A. That was the 20th day of February.

Q. 19 what? [10]                      A. 48.

Q. In relation to that date, do you recall approximately when you purchased scrap iron from the Pennsylvania Salt Company?

(Testimony of Frank Powser.)

A. It was about three weeks before I sold it.

Q. And to whom did you sell that scrap iron?

A. I sold that to Radinsky & Son, Seattle.

Q. How did you happen to buy this scrap iron from the salt company?

A. They called me on the telephone to come down and look at it, and I bought it.

Q. How did you buy it? Was it by bid or just outright purchase?

A. According to the city scale, according to weight.

Q. Do you recall the contents of the scrap iron that you purchased during that month? You stated you made the purchase three weeks before?

A. Yes.

Q. Will you tell the jury what the contents of that scrap were?

A. It was old pipes and scrap iron, it was pipe, scrap pipe, and naturally it was iron.

Q. Handing you Plaintiff's Exhibits 1, 2, 3 and 4 and Plaintiff's Exhibits 7, 8, 9 and 10, would you look at Plaintiff's Exhibits 1, 2, 3 and 4 first, and would you tell [11] the Court and jury what those pictures represent?

A. That is the coil I purchased from the Penn. Salt Company.

Q. And would you look at all those pictures, 1, 2, 3, and 4? A. Yes, that is the same coil.

Q. Do they represent different features or aspects of that pipe?

(Testimony of Frank Powser.)

A. They do, because the first picture was taken, there was lots of grass around it.

The Court: He is looking only at two of the pictures.

Q. Will you look at 3 and 4 please?

A. Yes, that is the same coil.

Q. Would you look at 4?

A. Yes, that is the same coil.

The Court: What is the word you used, coil?

The Witness: Coil.

Q. When you mentioned the word Penn. Salt Compay, do you mean the Pennsylvania Salt Manufacturing Company?

A. Well, I call it Penn. Salt. That is the only way—the name I got for them, and that is what I call them.

Q. Do you know whether Penn. Salt Company and Pennsylvania Salt Manufacturing Company are one and the same firm? [12]

A. I don't know.

Q. You don't know that yourself? A. No.

Q. Where is the Penn. Salt Company, Mr. Powser? A. It is down on the tide flats.

Q. Is it located in Tacoma also?

A. In Tacoma, down in the tide flats.

Q. Would you look at Exhibits 7, 8, 9 and 10, and tell the Court and jury what those pictures show? A. That shows the same coil.

Q. You heard the testimony that the pictures of that coil were taken yesterday?

(Testimony of Frank Powser.)

A. Yes, I did.

Q. And do those pictures represent the position the pipe is in at the present time?

A. They do.

Q. And do those pictures represent the pipe which was purchased by you in that scrap iron during the early part of February, 1948?

A. Yes, it does.

Q. And do those pictures show the pipe from which this material spewed forth and injured Oscar Haynes?

A. Yes, sir.

Mr. A. L. Maslan: I offer those pictures in evidence. [13]

Mr. Preston: May I question the witness?

The Court: You may, upon voir dire.

Mr. Preston: Mr. Powser, when did you first see this pipe that is shown in these exhibits?

The Witness: The first I saw that pipe, at the Penn. Salt Yard.

Mr. Preston: You saw them at the yard?

The Witness: Yes, sir.

Mr. Preston: You went there yourself?

The Witness: I was called, and I come down and looked at it, at the pipe.

Mr. Preston: And you saw these pipes that are shown in the exhibits?

The Witness: Yes, I did.

Mr. Preston: And recognize it?

The Witness: Recognize it, yes.

Mr. Preston: And recognize it as such——



(Testimony of Frank Powser.)

The Witness: Recognize it, yes.

Mr. Preston: —as such in these pictures?

The Witness: Yes, I do.

The Court: Each of these exhibits, namely, Plaintiff's Exhibits 1, 2, 3, 4, 7, 8, 9 and 10 is now admitted.

(Plaintiff's Exhibits 1, 2, 3, 4, 7, 8, 9 and 10 received in evidence.) [14]

Q. Mr. Powser, do you recall the morning, approximately close to 12:00 o'clock, when Oscar Haynes, together with his associate, Huston Hubbard, came to your yard to pick up some scrap iron?

A. Yes, sir.

Q. Would you tell the Court and jury what that scrap iron consisted of, the scrap iron that these two boys were to pick up?

A. The pipe and scrap and general scrap iron, that is the only way I can describe it to you.

Q. Did that include this pipe that you just testified about?

A. Yes, sir, it included that pipe.

Q. Where was that pipe located as far as your yard was concerned?

A. It was laying right in my yard.

Q. How long had it been there before Oscar Haynes attempted to move it?

A. A couple of weeks.

Q. And that was the pipe you bought from the Pennsylvania Salt Company? A. That's right.



(Testimony of Frank Powser.)

Q. Would you tell the Court what Oscar Haynes proceeded to do, as far as you yourself saw?

A. Well, I didn't see anything, just I was standing [15] talking to him.

The Court: Wait just a moment and think of the last question. Do not say something that is not called for in this question. Say what this question calls for, insofar as you know the answer.

The Witness: He was proceeding to loading that scrap.

Mr. A. L. Maslan: I have to go back another question or two, will Your Honor excuse me?

The Court: You may do that.

Q. How did you get that pipe to your yard?

A. Well, I load that pipe on my truck at the Penn. Salt and unloaded it in my yard, brought it down over to my yard with my truck.

Q. Who did that?

A. Mr. Russell and Mr. Miller.

Q. Were you on the truck, too?

A. No, sir, I wasn't on the truck.

Q. At that time was Mr. Russell working for you?      A. Yes, sir.

Q. Was Mr. Miller working for you?

A. He just come up, he wasn't working steadily. He just come up and I give him work in odd times.

Q. You gave him odd jobs?

A. Pardon, he wasn't working for me, I got ahead of [16] my time. At the time I took the coil

(Testimony of Frank Powser.)

from the Penn. Salt—ask me the question again, if you please?

Q. At the time you took the pipe from the Penn. Salt, who removed it from the Penn. Salt?

A. Mr. Miller and Mr. Russell.

Q. And were you there, too?

A. They moved it over to my yard.

Q. Was the pipe in the same condition on the 20th day of February as on the day that you removed it from the Pennn. Salt Company?

A. Yes, it was.

Q. Did you tamper with the pipe in any way?

A. No, I didn't.

Q. Did you have occasion to touch it or move it in any way?

A. We just unloaded it out of my truck and left it lay in the yard, and the Radinsky truck come up and they loaded the pipe in the Radinsky truck.

Q. Would you state what happened when Oscar proceeded to load the pipe onto his truck?

A. The only thing, my back was turned to him at that time, I looked at him, I was talking to the man in my yard, I heard all of a sudden a scream and, "I'm blind, I'm blind, take me to the doctor," so I grabbed him and put him in the car and what's-his-name, his associate, went with me, [17] holding his hands, and I took him down to the General Hospital just as quick as I could.

Q. Who do you mean by, "what's-his-name"? Is that Huston Hubbard?

A. Yes.

(Testimony of Frank Powser.)

Q. When you heard him say, "I'm blind" where was he?

A. He was about ten feet away from me, but my back was turned when this happened. I don't know how it happened or anything about it. I just heard, "Take me to the doctor, I'm blind, I'm blind" and so I put him in my car and went as fast as I could to Tacoma General Hospital.

Q. Was he in the truck when you first saw him after he screamed?

A. No, he jumped off the truck. He was on the ground, rather.

Q. Did you notice what foreign material was on him?

A. It was kind of a white stuff.

Q. Did you have occasion to touch that yourself?

A. Never did. I touched it myself, yes, when I took him down to the hospital, I got it on my hands, and on my dash.

Q. What happened to your hands and the dash?

A. It kind of burned my hands and burned the paint off the dash.

Q. Do you know how long it was on the dash to do that? [18]

A. It was there about—when I got out of the hospital, I looked and my dash, the paint was burned off.

Q. What happened when you took him to the hospital?

A. I took him to the hospital and the nurses,

(Testimony of Frank Powser.)

they took him in the dressing room and they called a doctor and they started working on him.

Q. What's that?

A. They put him in a dressing room and called a doctor, and that's all I know.

Q. When you first saw him on the ground, did he appear to you to be in pain?

A. He was in terrific pain.

Q. Would you describe that as best you can?

A. The only thing I know, my back was turned toward him, I looked back toward him and he got ahold of his eyes, he says, "please take me to the doctor, I'm blind, I'm blind" so his associate fellow working with him, we put him in the car, of course there was excitement, I don't know just what happened. We took him there, put him in the car and took him right up to Tacoma General.

Q. Was he in pain all during this trip?

A. Yes, he was.

Q. Did you notice what Huston Hubbard was doing when you were driving the boy to the hospital?

A. He hold his hands so he don't rub his eyes, because I was afraid he cut his eyes all up, and this gentleman hold his hands, and I took him over to the hospital.

Q. Did you have occasion to notice how his face looked when you were driving him to the hospital?

A. Well, it looked pretty bad. I didn't have a chance to look at his face when I was driving, but

(Testimony of Frank Powser.)

when I got him to the hospital, I looked at it. It was pretty bad. Then I left.

Q. What do you mean, pretty bad? What were the physical characteristics of the face?

A. The skin was burned, it was pretty bad shape.

Q. Was he bleeding at that time, if you remember?  
A. I don't remember now.

Q. Did you have occasion to see him at the hospital on any later occasions?

A. Yes, I used to come and visit about once a week, went up to see him.

Q. Did you notice how he looked when you first saw him in the hospital the first week?

A. He was all bandaged up and he was awfully—his face was—his eyes were shut, and you can't hardly see the face. It was all bandaged up.

Q. During that time, did he appear to you to be in pain?  
A. Yes, he was. [20]

Q. After he was in the hospital?  
A. Yes.

Q. At any time after you got the pipe and until the time of the accident, did you know that this pipe contained any caustic material of the nature that you described?

A. No, I didn't know that at the time. I purchased the pipe.

The Court: You may ask him another question covering the other time covered in your first question, if you wish.

Q. And did you at any time from that time to

(Testimony of Frank Powser.)

the time of the accident know that there was any such foreign material in the pipe?

A. No, I didn't know.

Q. Did anyone of the chemical company advise you to be careful about the pipe?

A. No, they didn't.

Q. I am talking about the Penn. Salt Company.

A. No, they didn't advise me at all.

Q. Where is that pipe now?

A. This pipe is still laying in my yard, belongs to Radinsky.

Q. You don't own it now?

A. No, I don't own it now.

Q. What part of the yard is it located in now?

A. I would say about the edge of the yard.

Q. I beg your pardon?

A. The edge of the yard.

Q. You looked at those pictures. Do they represent the location of where the pipe is now?

A. Yes, they do.

The Court: At this point, we will take the noon recess. During this noon hour, I ask the jurors to remember and heed the Court's previous admonitions against receiving information about this case, and about all of the details as to which the Court instructed you, and this will apply at all times when you are absent from the jury box during the progress of the trial. All those connected with this case are excused until 1:45. Court will be in recess until 1:15. The Court has to take up another matter at 1:15.



(Testimony of Frank Powser.)

(At 12:10 o'clock p.m., Tuesday, November 22, 1949, proceedings recessed until 1:45 o'clock p.m., Tuesday, November 22, 1949.)

Seattle, Washington; November 22, 1949,  
2:15 o'Clock, P.M.

The Court: All of the jurors are present as before the recess. All parties on trial are present with their counsel. You may proceed.

Q. Mr. Powser, you have identified Exhibits 7, 8, 9, and 10 as being pictures taken yesterday of the pipe in question, is that so? A. Yes, sir.

Q. You have them there, Mr. Powser?

A. Yes, sir.

Mr. A. L. Maslan: May it please Your Honor, I believe the jury might be interested in those pictures at the present time. May they be passed to the jury?

The Court: All these exhibits except those already passed to the jurors may be passed among the jurors under the same conditions as stated by the Court concerning the others. The jury is reminded that you do not have to make a detailed study of these exhibits now. You will have an opportunity later for more detailed and careful and a greater time consuming opportunity to make the more studied inspection.

Q. The bailiff will hand you Plaintiff's Exhibit 8 [23] which is in evidence. Do you notice that T there, or the connection to the right of that picture?



(Testimony of Frank Powser.)

A. Yes, sir.

Q. Could you state to the Court and jury from what particular part of that pipe the caustic material exuded or came out?

A. It came right out of that pipe, out of that corner.

Q. You are pointing to what particular section? Would you show the jury where you are pointing?

A. I am pointing right there, to that pipe.

Q. Would you state for the record just what portion that is, or where it came from?

A. It came right on the side.

Q. What do you call the side?

A. It is a pipe, a plug. It is a piece of pipe and a plug top.

Q. The plug top, you call it? A. Yes.

Q. Have you recently seen that pipe?

A. Well, I see it pretty near every day, walk around it.

Q. Is any of that material still discernible? Can you still see it? A. Not lately, no.

Q. But after the accident, could you see that material [24] for any length of time?

A. Well, the week after, it was still smoking out of the same place, out of that pipe.

Q. For a week afterwards?

A. Yes, a week or so.

Q. Prior to the accident, did you ever have any indication that there was such a material in the pipe? A. No, I didn't.

(Testimony of Frank Powser.)

Q. Would you testify to the jury what the condition of your car was after you took Oscar to the hospital? A. It burned the paint on my dash.

Q. What's that?

A. That thing burned the paint on my car, on my dash, and burned my hands, it was so strong.

Q. Did you know Oscar Haynes prior to the accident?

A. Yes, I knowed him before, saw him before.

Q. How long did you know him prior to the accident, if you recall?

A. I recall about six or seven months, something like that.

Q. Did you ever have occasion to notice his complexion, his features? A. Yes, I did.

Q. What was his complexion?

A. It was kind of a light complexion. [25]

Q. Was his face clear? A. It was clear.

Q. Is it much different than it is now?

A. Big difference.

Q. What's that? A. Big difference.

(Photograph marked Plaintiff's Exhibit 11 for identification.)

Q. I hand you Plaintiff's Exhibit 11 for identification and I will ask you whether you recognize that picture as being the picture of Oscar Haynes prior to the accident? A. Yes, I do.

Q. Is that a good replica of the way his features looked to you before the accident?

A. Yes, sir.

(Testimony of Frank Powser.)

Mr. A. L. Maslan: I offer that in evidence, may it please Your Honor.

The Court: It is now admitted.

(Plaintiff's Exhibit 11 received in evidence.)

Mr. A. L. Maslan: Will you pass Plaintiff's Exhibit 11 to the jury, please?

Q. I do not recall whether you testified whether there was other pipe in addition to the pipe in question in that load of scrap iron?

A. Yes, there was.

Q. Was there a good deal of pipe in addition to that pipe? A. It was mixed scrap.

Q. In that mixed scrap, there was other pipe in addition to the pipe in question?

A. Yes, that's right.

Q. Did you ever have occasion to watch Oscar and his work?

A. Well, I watched him lots of times to work, yes.

Q. What type of workman was he?

A. He was a good worker.

Q. Was he a vigorous worker, heavy worker?

A. Well, he worked pretty steady.

Q. To your knowledge, did he have any bad habits as far as his work was concerned?

A. Not that I know of.

Q. Did he appear to be able to handle the heavy scrap iron and other heavy materials?

A. Yes, he did.

(Testimony of Frank Powser.)

Mr. Preston: Objected to as leading.

The Court: Sustained. Avoid leading.

Mr. A. L. Maslan: You may take the witness, counsel. [27]

Cross-Examination

By Mr. Preston:

Q. He didn't work for you?

A. No, he didn't.

Q. Never did work for you?

A. Never did.

Q. Your occasions of noticing him would be when he was working for somebody else?

A. That's right.

Mr. Preston: I have no questions except I would like to have the witness remain on another phase of the case concerning which we spoke.

The Court: Do not depart. Remain in attendance about the Court until you are later excused. You may step down now.

(Witness excused.)

The Court: Call the next witness.

HELEN MYERS

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows: [28]

Direct Examination

By Mr. A. L. Maslan:

Mr. A. L. Maslan: May it please Your Honor, at this time I am attempting to prove through the record clerk that these are the records, and we will introduce them through the proper source at a later time, through the doctor.

(Hospital records marked Plaintiff's Exhibits 12 and 13 for identification.)

Q. What is your full name?

A. Helen Edith Myers.

Q. What is your occupation?

A. I am the medical records librarian in charge of records at Tacoma General Hospital.

Q. In relation to your duties, have you occasion to keep the records in relation to the patient, Oscar V. Haynes at your hospital?      A. Yes, sir.

Q. Where do you live?

A. The street address?

Q. Yes.

A. 702 South K Street, Apartment 105, Tacoma.

Mr. Preston: Are you offering them at this time? [29]

The Court: Let the witness have a chance to see what it is, unless counsel can agree and state in

(Testimony of Helen Myers.)

the record pursuant to such agreement what it is.

Mr. Preston: I have no objection to the witness stating what it is. I haven't had opportunity to examine them as to admissibility.

The Court: You may proceed.

Q. The bailiff has handed you Exhibits 12 and 13. Would you state to the Court and jury what those are?

The Court: First as to Plaintiff's Exhibit 12.

The Witness: No. 12 is the admission record and case of the patient in the hospital.

The Court: Relating to what patient, if any?

The Witness: Relating to the hospitalization of Mr. Oscar Haynes during the period of February 20th continuously through April 18, 1948.

Q. Are those the records that were kept in the usual course of business of the hospital?

A. Yes, sir.

Q. Do you know how those records were kept?

A. Yes, sir.

Q. Will you please state how those records are kept?

A. I am not sure that I understand the question.

Q. Who did keep those records?

A. They would be filed in the medical record department of the hospital.

The Court: By whom, and who made them, if you know?

The Witness: They are made by a number of different people, the admitting clerk, and so on and

(Testimony of Helen Myers.)

so forth, the interne, the consultant, the emergency treatment, the chemical laboratory reports, the medication treatment, diet and progress record, the clothing list, and my notes appended stating that the chart has been taken to this Court. This portion of the chart is the nurse's notes. They are filed separately for convenience.

The Court: You made a statement there without indicating what exhibit it refers to. The last one mentioned was what?

The Witness: No. 13.

The Court: "This portion of the chart," did that refer to Plaintiff's Exhibit 13?

The Witness: Yes, sir.

Q. From reading these records, who was the doctor in charge of the case, do you remember?

A. Drs. Walter Cameron and J. Read.

Q. And they also made their notations on these records? A. Yes, sir. [31]

Q. In addition to the nurses and daily attendants? A. Yes, sir.

Q. Is that the usual practice of the hospital?

A. It is.

Q. Is that the usual practice of all hospitals, to your knowledge?

A. To my knowledge, yes, sir.

Mr. A. L. Maslan: I offer these records in evidence, may it please Your Honor, at this time.

The Court: Each of them is now admitted.



(Testimony of Helen Myers.)

(Plaintiff's Exhibits 12 and 13 received in evidence.)

Mr. A. L. Maslan: Take the witness.

Mr. Preston: No questions.

The Court: You may step down.

(Witness excused.)

Mr. A. L. Maslan: May I suggest to Your Honor that the records remain there until the doctor discusses them?

The Court: They are in evidence. They will have to remain.

Mr. A. L. Maslan: As far as this young lady is concerned, she might have some qualms about leaving them here. [32]

The Court: They are in evidence. Every one will have to understand that they are in the Court's custody. They will have to stay here for all time unless they are otherwise later disposed of.

### FRANK RUSSELL

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. A. L. Maslan:

Q. What is your name, please?

A. Frank Russell.

Q. Where do you live?

(Testimony of Frank Russell.)

A. 4511—South Hood Street, Tacoma, Washington.

Q. What is your occupation.

A. Truck driver.

Q. Who do you work for?

A. Frank Powser.

Q. Are you still working for him?

A. Yes, sir..

Q. Were you working for Mr. Powser on the 20th day of February, 1948?      A. I was. [33]

Q. Are you acquainted with Oscar Virgil Haynes?      A. Yes, sir.

Q. This boy here?      A. Yes, sir.

Q. Were you acquainted with him at that date?

A. What do you mean?

Q. Were you acquainted with him at that time, February 20th?      A. Yes, sir.

Q. There has been some discussion had in relation to a certain coil of pipe. Looking at these exhibits, Exhibits 1, 2, 3 and 4 and Exhibits 7, 8, 9 and 10, could you state what those pictures represent? Do you know what those pictures represent?

A. Yes, sir.

Q. What?      A. Pipe coil.

Q. Do you know where that pipe coil came from?

A. Yes, sir.

Q. Where did it come from?

A. I picked it up myself from the Pennsylvania Salt Company.

Q. Where is that Pennsylvania Salt Company?

(Testimony of Frank Russell.)

A. On the tide flats, at the tide flats.

Q. That is in Tacoma? [34]

A. Yes, sir.

Q. How far from your shop is that factory plant located?

A. Approximately across the flats about a mile or a mile and a quarter.

Q. In relation to the accident which occurred February 20, 1948, do you recall when you picked up that pipe?

A. I do not know the date. I hauled that pipe in the yard, but I do the month.

Q. What is that?

A. I don't exactly recall the day I hauled that pipe out of there.

The Court: We have not heard anything definite. You made some reference to the word, month. What do you mean as to when you hauled it?

The Witness: He asked me if I remembered the day I hauled that pipe into Mr. Powser's yard.

The Court: What was your answer?

The Witness: I don't recall the day.

The Court: Do you recall any other thing or fact as to the time when you did that act?

The Witness: Yes.

The Court: State it.

The Witness: We hauled that in January. [35]

The Court: In January, 1948, or some other year?

The Witness: 1948.

(Testimony of Frank Russell.)

Q. Approximately how long prior to February 20th would you say that was, February 20th being the day of the accident?

A. We didn't have the pipe there very long, between two and three weeks.

Q. Where was that pipe lying?

A. Laying right in the yard.

Q. Who picked up that pipe from the Pennsylvania Salt Manufacturing Company yard?

A. I did, and Mr. Frank Miller.

Q. Who were you working for at that time?

A. Frank Powser.

Q. And Mr Miller was working for Frank Powser at that time?

A. For that day, yes.

Q. Did you then take it to your yard from the salt company yard?

A. Yes, sir.

Q. Were you advised at any time that that pipe contained any chemical or caustic material?

A. I wasn't.

Q. Do you recall the accident itself?

A. I just got through eating my lunch when that happened, so I didn't see it with my own eyes.

Q. What was the first occasion that you heard that there was an accident?

A. The only thing, I turned around and hear him screaming.

Q. Hear who screaming?

A. That boy there.

Q. Could you state what he was doing at that time when he was screaming?

(Testimony of Frank Russell.)

A. I had to go around the truck to find out, there was too much excitement there at that time.

Q. What did you find when you got around the truck?

A. When I got around the truck, Mr. Powser and that colored boy was already walking him towards the car.

Q. Did the boy appear to be in pain?

A. Yes, sir, he was hollering.

Q. Do you know what he was saying?

A. Well, it is pretty hard, you know, when you are in a spot like that, you don't think very much; just get the boy to the hospital, that's the main thing.

Q. Who took him to the hospital?

A. Mr. Powser.

Q. Did you have occasion to notice what the condition of the pipe was at that time? [37]

A. No, sir.

Q. Were you riding with Powser when they took him to the hospital?

A. I stayed with him in the truck.

Q. What do you mean by that?

A. Trying to get him so they could get right of way in town. They give right of way quicker to the truck than they do to the car.

Q. Was the truck ahead of the car?

A. It was going, around 60 miles an hour, it should be.

Q. And the car followed you?

(Testimony of Frank Russell.)

A. The car was right alongside of me.

Q. What happened when you got to the hospital?

A. Well, sir, I don't know much. They took him in and I left.

Q. To go back to the yard? A. Yes, sir.

Q. Did you have occasion then to look at the pipe?

A. I did, and I told the other boys that was around to stay away from it, and I put a piece of tin right over that T.

Q. Was there any smoke? A. Yes, sir.

Q. Will you state what the condition of that nozzle was on the pipe? [38]

A. There is no nozzle, just a little connection from the pipe in a T crosswise.

Q. Would you state what the condition of that was at that time when you got back?

A. Well, they had some kind of a gray stuff, between white and gray, it was still steaming out of there, approximately that high, from the T. It was still coming out that high.

Q. How long did that steam continue, if you remember?

A. Four or five days. On the third day, I looked at it every morning when I come to work, and we finally put a piece of tin there and put a little mark on it for everybody to keep their hands off, because we didn't want an accident to happen in the yard by anybody else.



(Testimony of Frank Russell.)

Q. Under whose directions was it that you went to the Pennsylvania Salt Manufacturing Company to pick up the pipe?

A. Under Mr. Powser's direction.

Q. Who did you get the pipe from when you got to the salt company?

A. The Pennsylvania Salt Company in the tide flats.

Q. Was there any particular person that you dealt with who directed you to pick up that pipe?

A. It is hard to tell. Sometimes there is several men there. They supervise, tell you to take this. We don't ask questions when we go there, what we should take or [39] shouldn't. We take what we are told to take.

Q. How many days did it take you to pick up all that scrap iron?

A. I think I hauled two loads out of there.

Q. Can you recognize any of the gentlemen of the salt company here who directed you to pick up the pipe and take it out?

A. He didn't exactly direct me just to pick up the pipe alone, he directed me to pick up everything that was laying there.

Q. Did that include the pipe?

A. The pipe was in it.

The Court: The question is unanswered. Remind him of the question you put to him.

Q. The question was, who was it of the group, if there are any of the men here, who directed you to pick up that scrap iron, including the pipe?



(Testimony of Frank Russell.)

A. That gentleman there, but he didn't point directly at the coil. He told me, "That stuff goes."

Q. Who is that gentleman?

A. Right there on the end.

Q. At the table?

A. I think so. You look like him, but he didn't tell me the coil only. He told me what lays there.

Mr. A. L. Maslan: May I have the name? [40]

Mr. Starin: This is Mr. Edwin Cliffe.

Q. Did he, when he pointed to the scrap iron, including the pipe warn you about any propensities of the pipe? A. No, sir.

Q. Did he tell you at any time that the pipe contained any chemical? A. No, sir.

Q. Did you at any time have any knowledge that there was a chemical in the pipe?

A. I did not.

Q. Did you know Oscar Haynes before this accident? A. I did.

Q. How long a period of time did you know him?

A. I know him for six or seven months, and he hauled iron from the yard for Mr. Radinsky.

Q. Was he a good worker to your knowledge?

A. I didn't have time to watch him work, I had to do my own work.

Q. Handing you Plaintiff's Exhibit 11, showing you a picture which has been identified of Oscar

(Testimony of Frank Russell.)

Haynes, would you say that was a fair representation of his features prior to the accident?

A. Yes, lots of difference.

Mr. Preston: I submit that was not the question. The answer is not responsive.

The Court: The objection is sustained. It is stricken and the jury will disregard it. Try to have in mind the specific thing he asked you and respond to that.

Q. Mr. Russell, did that picture look like Oscar before the accident?

A. Before the accident, yes.

Mr. A. L. Maslan: That is all. You may take the witness.

### Cross-Examination

By Mr. Preston:

Q. I understand you made two trips?

A. I am pretty sure it was two. I pick out the load of short scrap, and then we went back and had to use a small crane to load that stuff with it.

Q. Do you recall on which occasion it was you talked to Mr. Cliffe, or were directed by him?

A. There was two men there, and he didn't point to the coil and tell me, "Take it". He told me, "That stuff goes". There is another man there, but I don't recall his name.

Q. Was that the first time you went there?

(Testimony of Frank Russell.)

A. The first time we pick up all the short stuff.

Q. Do you remember whether it was the first or second trip on which you took this coil?

A. We took this coil on the last trip.

Q. Where did you take it?

A. To Frank Powser's yard.

Q. Did you take it anywhere in between?

A. No, sir.

Q. Or do anything with it? A. No, sir.

Q. Where did you unload it?

A. I unloaded it right at the yard.

Q. What do you mean, right in the yard? What part of the yard, the same place where it was later on?

A. The same place when Mr. Radinsky picked it up.

Q. What was it you said about January? I didn't get that.

A. I got mixed up on that, on the month. It was February.

Q. I take it that you mean to say that you got this load between two and three weeks before the accident happened whenever that was?

A. Well, the coil did lay in the yard from two to three weeks before it was sold by Mr. Powser.

Q. And you didn't get it as early as January, I take it? [43] A. No.

Q. Did you have any trouble getting the coil on the truck?

(Testimony of Frank Russell.)

A. We had a small crane there, and we done the best we could.

Q. How did it compare with the crane in the Powser yard?      A. What?

Q. Did you have a crane in the Powser yard?

A. No, we took that small crane from the Powser yard to the Pennsylvania Salt to load heavy scrap iron with it.

Q. Were you able to load the coil onto the truck with the aid of the crane?

A. Yes, sir.

Q. Did you have to take a hammer and pound any part of it?      A. No, sir.

Q. When you loaded this pipe, did you notice whether it was capped or not?

A. No, sir, I did not.

Q. How many of you loaded the pipe?

A. Two.

Q. And the same two unloaded it?

A. Yes, sir.

Q. Either on the occasion of loading or unloading it, [44] didn't you notice whether or not the pipe was capped, that is, closed?

A. Well, sir, we don't—

Q. Did you or didn't you?      A. No.

Mr. Preston: That is all.

(Testimony of Frank Russell.)

Redirect Examination

By Mr. A. L. Maslan:

Q. Was that pipe purchased as part of the scrap iron?      A. Yes, sir.

Q. And was there anything at all to lead you to believe that the pipe did contain this chemical?

Mr. Preston: That is not direct, it is repetitious and it is leading.

The Court: The objection is sustained. I think you have already brought out from the witness what knowledge he had.

Mr. A. L. Maslan: I don't think this was brought out, Your Honor.

Q. Was anything done to this pipe by you or Mr. Powser while it was in your yard and prior to the sale to Mr. Radinsky?

A. No, sir. It was placed there as scrap iron only. It wasn't salable for anything else. [45]

Q. I beg your pardon?

A. It wasn't salable for anything else. It was placed in a pile for scrap iron only.

Mr. A. L. Maslan: That is all.

The Court: You may step down.

(Witness excused.)

The Court: Call the next witness.

Mr. A. L. Maslan: Mr. Hubbard.

## HUSTON HUBBARD

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

## Direct Examination

By Mr. A. L. Maslan:

Q. What is your name, please?

A. Huston Hubbard.

Q. Where do you live?

A. 111—12th Avenue.

Q. What's that? A. 111—12th Avenue.

The Court: Is that in some city?

The Witness: Seattle. [46]

Q. That is in Seattle, is it not? A. Yes.

Q. Who do you work for?

A. B. R. Radinsky & Son.

Q. How long have you worked for him?

A. A little better than two years.

Q. Were you working for him on the 20th day of February, 1948? A. I was.

Q. Did you have occasion to travel with Oscar Haynes to Tacoma?

A. I was. He sent me out with him on a truck to help load the truck.

Q. Who is "he"? A. Jack, my boss man.

Q. Jack Radinsky? A. Yes.

Q. He sent you out with Oscar Haynes?

A. Yes.

Q. What truck were you driving?

A. A semi.

(Testimony of Huston Hubbard.)

Q. A semi truck. Would you tell the Court what type of truck that is?

A. Just a big truck, that's all I know. I couldn't explain it to you, a big, large truck. [47]

Q. Does it have a trailer attached to it?

A. Yes.

Q. What sort of bed did that truck have?

A. A steel bed. When you get ready to haul iron, you put some stakes on the side and steel plates up there.

Q. A flat bed? A. Yes.

Q. How long was that truck, do you know?

A. I would say about 40 feet.

Q. Did you proceed to load the iron on the truck at the Powser yard? A. I did.

Q. Who was with you?

A. Oscar Haynes.

Q. Would you tell the Court and jury how you proceeded to load that iron onto the truck?

A. We got there about 9:30, and when we got there they didn't have no crane.

Q. When you say you got there, where was it that you got? A. Tacoma.

Q. What yard?

A. Frank Powser Yard, and when we got there they didn't have no crane driver, and so we decided to pick up all the small iron, all the small pipes and load on the [48] truck, and we gathered up all the small pipes to load on the truck, decided we would eat lunch, and we ate lunch. We got through eating



(Testimony of Huston Hubbard.)

lunch about 11:30, started back to work and the crane man came, and we decided to pick this coil up and load on the truck. We loaded the coil on the truck, and as we loaded the coil, we put it on one side.

Q. How did you happen to load it?

A. With the crane. We let it down on the truck, and as we let it down, there was a nozzle holding it back from the side, so I just knocked the nozzle off.

Q. What's that?

A. I just knocked the nozzle off so we could push the pipe up close to the bed, so we could load the truck better. It was sticking out on the side so we couldn't load the truck good, so I asked Frank to hand me the sledge hammer, and he handed me the sledge. I was goin to hit it, but Oscar said, "Let me hit it" so I give Oscar the hammer and he hit it one lick and nothing happened, and he hit it two licks and it exploded in my face and his face, and I jumped back, fell over the truck. It was all on my eyes and face. I wiped it out of my eyes and face, and Oscar was hollering, "I can't see" so I managed to wipe it out of my glasses. I grabbed him and twisted his arm, kept him from rubbing his face, so I hollered to Frank Powser to come and take this boy to the hospital, and I turned around and I was pushing Oscar to the car.

As I pushed him in the car, Frank started the car and started to the hospital, and on the way to the hospital, Oscar grabbed his arm loose from me

(Testimony of Huston Hubbard.)

and rubbed his eyes, and he said, "My eyes are bleeding" and Powser said, "I think it looks like they are bleeding." I said, "No, they aren't bleeding" but his eyes was bleeding. I told him that so he wouldn't think nothing was happening.

It took us about 15 minutes to get to the hospital. I opened the door and pushed him out the car, in the hospital, in the elevator. We went downstairs on the elevator to the operating room, and I grabbed him and put him on the table, and he was hollering, "I can't see, don't leave me." The nurses came in and said, "What's the matter?" I said, "He got some acid or something in his face." They said, "Do you know what it is?" I said, "I don't." They said, "We'll call the chemical company."

They called and they said it was lye, and they started putting something in his eyes for lye. They called again and said it was something else. He was hollering, "Don't leave me, Huston." The nurses said, "Go out." He wouldn't let me go out, he was holding me, he was paining. In a few minutes, they managed to turn me loose and I walked outside and stood outside the hospital room.

Q. Did he appear to you to be in much pain? [50]      A. Yes, awful pain.

Q. Did you have occasion to look at the pipe after the accident?

A. Yes. That happened about fifteen minutes to twelve, and we stayed up there to about 2:30, when we got back to the truck we had to unload pipe

(Testimony of Huston Hubbard.)

off the truck and the pipe was smoking and the stuff steaming out.

Q. Did you have any knowledge there had been any chemical or caustic in the pipe?

A. No. We asked that question before we loaded. We asked Frank Powser, was the pipe drained, because the pipe seemed so heavy. I didn't think a pipe should be so heavy unless something was in it. I asked Frank Powser was the pipe drained, and he says, "Yes, that was supposed to be drained."

Q. There was nothing to give you any idea?

A. Nothing to give me no idea.

Q. Did you have that maul in the truck?

A. No, we didn't have the maul in the truck.

Q. Where was the maul?

A. The maul was on the ground.

Q. Do you know what I mean by maul?

A. A sledge hammer.

Q. Yes. A. That's right. [51]

Q. Where did you get that sledge hammer from?

A. It was Frank Powser's sledge hammer.

Q. Were you well acquainted with Oscar Haynes before the accident?

A. Yes, about a year and a half.

Q. Did you work with him? A. Yes.

Q. Are you looking at Oscar Haynes now?

A. Yes.

Q. Is there much difference between his appearance now and his appearance before the accident?

(Testimony of Huston Hubbard.)

A. A whole lot of difference.

Q. What is the difference, as far as you can see?

A. The difference as far as I can see, he was a nice kid, a young kid, his face was smooth and in a better shape than it is now.

Yes, that is the shape he was in before he got hurt.

The Court: I think the witness has in his hands Plaintiff's Exhibit 11.

Q. You are speaking from Plaintiff's Exhibit 11, the picture of Oscar? A. Oscar, yes.

Q. Do you know what vision he had before the accident, Huston?

A. Yes, it seems like he was in good shape, that's all [52] I know.

The Court: That question relates to his eyes and ability to see.

The Witness: Yes, he could see good. He was a truck driver, he could see good, wasn't nothing wrong with his eyes as far as I know.

Q. Do you know what his condition is as far as seeing is now?

A. Well, it is bad, because you have to lead him around.

Q. Did he ever have to wear glasses, to your knowledge? A. No, no glasses.

Q. Handing you Plaintiff's Exhibits 1, 2, 3 and 4 and 7, 8, 9 and 10 which represent pictures of the pipe, I ask you can you identify the object pictured in those pictures?

(Testimony of Huston Hubbard.)

A. Yes, I can identify the pictures.

Q. What do those pictures show?

A. The coil of pipe Oscar got hurt by.

Q. In addition to that coil of pipe, were there any other objects you had placed in the truck?

A. No.

Q. What's that?

A. Nothing but the pipes, wasn't nothing in the way but this pipe, and this nozzle was in the way.

Q. I know, but were there any other pipes or pieces [53] of metal that you were putting into the truck?

A. No, nothing but the pipe.

Q. Was that the first load of scrap you had taken from the yard?

A. No, we had been hauling the day before.

Q. Do you remember what you hauled the day before?

A. Yes, we hauled motors.

Q. What's that?

A. We hauled car motors.

Q. That was from Powser's yard, was it?

A. Yes.

Mr. A. L. Maslan: Take the witness.

### Cross-Examination

By Mr. Preston:

Q. Do I understand that when you started to put this coil in the truck, you noticed it was quite heavy?

A. Yes.

Q. Did both you and Mr. Haynes discuss that?

A. No, didn't discuss that. I just discussed that

(Testimony of Huston Hubbard.)

myself because I handled iron and I figured I could handle one end of it swinging, and I figured I could handle one end, because I handled more pipes and coils like that, and I figured I could handle one end of it, and I couldn't handle that end. [54]

Q. When was it you asked Mr. Powser about whether or not the pipe had been drained?

A. Just before we picked it up.

Q. Before you did what?

A. Before we picked up the pipe.

Q. When you say, "we," who do you mean?

A. I mean the truck driver, the one that had the crane. I don't know his name, the one driving the crane. I asked him before he picked it up to be put on the truck.

Q. Where was Mr. Haynes when this conversation took place about the draining or non-draining of this coil?

A. He was standing on the truck.

Q. How close to you?

A. Closer from here to that desk there.

Q. You say as close or closer?

A. As close, to that desk.

Q. Who did you talk to about that?

A. Frank Powser.

Q. You asked him if that coil had been drained?

A. I asked him was the coil drained, was anything in the coil.

Q. What did he say?

A. He says it was supposed to be empty.



(Testimony of Huston Hubbard.)

Q. Supposed to be empty? A. Yes. [55]

Q. But it didn't feel to you as though it was empty? A. It felt heavy to me.

Q. When he said it was supposed to be empty, did you do anything about determining whether it was empty or not?

A. No, didn't give me no idea there was nothing in it. I just thought it was heavy, that's all.

Q. Did you notice whether or not it was capped?

A. The only thing I noticed, just a nozzle on the end, that's all.

Q. Did you notice whether it was closed off?

A. No, didn't pay no attention to that.

Q. Did I understand you to say that you got some of this substance in your face?

A. In my face, it made sores in my face.

Q. Did you get any in your eyes?

A. No, because I had glasses on. If it got in my eyes, I would have been blind.

Q. You were wearing the same kind of glasses you have on now?

A. I got glasses on account of my eyes—I got one eye——

Q. You are wearing the same glasses?

A. The same glasses on now.

Q. You got some burns on your face?

A. I got some burns on my face. [56]

Q. How much of the acid did you yourself get on your face?



(Testimony of Huston Hubbard.)

A. On my face, I don't know, all in my face and glasses and on my clothes.

Q. From what you got on your face, were you hospitalized?      A. No.

Q. Did you wipe it off right away?

A. Yes.

Q. Both you and Mr. Haynes were working for B. Radinsky?      A. Yes.

Q. What kind of company is that?

A. Junk yard.

Q. Operating trucks?      A. Yes, trucks.

Q. Hauled junk by trucks?

A. Hauled junk by trucks, yes.

Q. And Mr. Haynes was truck driver and loader for that particular truck?

A. He was a truck driver, and he helped load, and I was the one that helped load the truck.

Q. He would load with you?

A. With me, yes.

Q. That was a regular part of his duties? [57]

A. That's right.

Mr. Preston: That is all.

The Court: You may step down.

(Witness excused.)

## FRANK MILLER

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

## Direct Examination

By Mr. A. L. Maslan:

Q. What is your name, please?

A. Frank Miller.

Q. Where do you live?

A. 1340 $\frac{1}{2}$  Pacific Avenue, Tacoma.

Q. 1341 $\frac{1}{2}$ ? A. 1340 $\frac{1}{2}$ .

Q. Tacoma, Washington?

A. Yes, sir.

Q. What is your occupation?

A. Truck driver.

Q. Have you ever had occasion to work for Mr. Frank Powser? [58] A. Yes, sir.

Q. Do you recall picking up some scrap iron from the Pennsylvania Salt Manufacturing Company? A. Yes, sir.

Q. For Mr. Powser? A. Yes, sir.

Q. Do you recall when that was?

A. Sometime in February.

Q. Of what year? A. 1948.

Q. And who picked up the scrap iron?

A. Me and Mr. Russell.

Q. Frank Russell? A. Yes, sir.

Q. At that time were you working for Frank Powser?

(Testimony of Frank Miller.)

A. I was working for Frank Powser at that time.

Q. Was this prior to the accident to Oscar Haynes?      A. Yes, sir.

Q. Did you accompany Frank Powser to the Pennsylvania Salt Manufacturing Company yard?

A. Frank Powser? No, sir.

Q. I beg your pardon, did you accompany Frank Russell?      A. Yes, sir.

Q. At whose request did you go there?

A. Mr. Powser. [59]

Q. What did you do when you went to the salt company yard?

A. I went over there with the crane, the cherry picker is what we call it.

Q. A cherry picker?      A. A hoist.

Q. For what purpose did you go there?

A. To lift up heavy material, scrap, to load some heavy scrap.

Q. Were any of the employees of the Pennsylvania Salt Manufacturing Company there to show you what the scrap was?      A. Yes, sir.

Q. Who were those employees, do you know?

A. I am not personally acquainted with them.

Q. Do you know any of them here?

A. I think this gentleman on the corner.

Q. Is that Mr. Cliffe?

A. I don't know his name.

Q. Did he show you what scrap iron to load onto your truck?

(Testimony of Frank Miller.)

A. He showed us part of this scrap laying around there, what to pick up and what to leave.

Q. And in relation to the coil of pipe, did he indicate that that pipe was to be picked up by you?

A. Yes, sir.

Q. And was that included in the pile of scrap iron?      A. Yes, sir.

Q. Handing you Plaintiff's Exhibits 1, 2, 3 and 4 and 7, 8, 9 and 10, what do those exhibits depict or show to you?      A. It shows the coil.

Q. Were you advised by the employees of the Pennsylvania Salt Manufacturing Company that the coil was part of the scrap iron bought by Mr. Powser?      A. Yes, sir.

Q. Pursuant to their direction, did you proceed to load that pipe onto your truck?

A. I wasn't driving the truck, Mr. Russell was driving the truck.

Q. Did you assist Mr. Russell?

A. I was running the hoist.

Q. Were you the one who hoisted that pipe onto the truck?      A. Yes, sir.

Q. Do you know what happened to that pipe thereafter?

A. We took it over to the yard and I unloaded it at the yard.

Q. Did Mr. Cliffe or any other employee of the Pennsylvania Salt Manufacturing Company advise

(Testimony of Frank Miller.)

you that that pipe might contain any caustic or acid? [61]           A. No, sir.

Q. Were you advised to use any extra precaution or care in the handling of that pipe?

A. No, sir.

Q. Did you have any idea that that pipe might contain any——

Mr. Preston: Objected to as leading and suggestive.

The Court: The objection is sustained. You may ask him another question.

Q. Was there anything which would lead you to believe that the pipe contained such an object?

A. No, sir.

Q. What did you do with the pipe when you got to the Powser yard?

A. We unloaded it right in the rest of the scrap iron.

Q. Were there any other pipes and pipe scrap in the load of scrap iron?           A. Yes.

Q. In addition to this coil of pipe?

A. Yes.

Q. Did this coil of pipe have the appearance to you of being discarded?

Mr. Preston: Just a minute, if the Court please. That calls for a conclusion. He can say what shape it [62] was in.

The Court: Sustained.

Q. What happened to that pipe thereafter, if you know?

(Testimony of Frank Miller.)

A. It laid there in the yard for several weeks, that's all I know.

Q. Did anyone touch that pipe between the time that you brought it to the Powser yard and the time of the accident?

A. I don't know how they could, they couldn't move it.

Q. Was it a heavy piece of pipe? A. Yes.

Q. You have dealt with scrap iron, have you?

A. Yes, sir.

Q. How long a time have you been dealing with scrap iron?

A. Off and on for a couple of years.

Q. Could you estimate how much that coil of pipe weighed?

A. I would say about 1500 pounds.

Q. Do you recall when the Radinskys purchased that pipe, if you know? A. I don't know.

Q. Do you recall the accident of which we are talking? [63] A. Yes, sir.

Q. Could you state the circumstances in relation to the accident?

A. Well, I picked up with the hoist——

Q. I beg your pardon?

A. I picked up this coil with the hoist, and they hooked on to it. I picked it up, drove out the back end of the truck, and put it right onto the semi.

Q. Who did that semi belong to?

A. Radinsky & Son.

Q. At the time that this happened, who did you

(Testimony of **Frank Miller.**)

work for?           A. I was working for Radinsky.

Q. In order to get this straight, at the time that you picked up the iron and scrap from the Pennsylvania Salt Manufacturing Company, who were you working for?           A. Frank Powser.

Q. How did you happen to work for Radinsky on the 20th day of February?

A. I come over to the yard, and they didn't have nobody to run this crane or hoist, and they wanted this stuff loaded on, so I loaded it.

Q. And at that time you were working for Radinsky?           A. Yes.

Q. Would you state what happened after that pipe was [64] loaded by you into that semi-trailer?

A. It was loaded onto the semi-trailer and they wanted to get it up against the side, and this T was on the coil, was in the way, and the first thing I knew, I seen them with the hammer, hitting it, and all at once it just flared up, kind of a gray foam come out of it.

Q. What did they do?

A. It went right into Mr. Haynes' face.

Q. What happened then as far as Mr. Haynes was concerned?           A. He jumped off the truck.

Q. What did he do?

A. He ran and hollered, had his hands up to his face, and screaming, said he was burned.

Q. Did he appear to you to be in pain?

A. Yes, he must have been in awful pain.

Q. I beg your pardon?



(Testimony of Frank Miller.)

A. The way he was hollering, he must have been in awful pain.

Q. Was he running or on the ground at that time?

A. He jumped clear off, and he run, I would say, 15 feet and then stopped.

Q. What was the condition of the pipe at that time?      A. It was on the truck.

Q. I know, but was there anything that was different [65] with the pipe after it had been hit?

A. Well, this foam was coming out of it all over the truck.

Q. Then what happened, as far as Oscar Haynes was concerned?

A. They took him to the hospital.

Q. Did you go with him?      A. No, sir.

Q. What did you do?

A. I stayed in the yard.

Q. Did you have occasion to notice the pipe again?      A. Yes, sir.

Q. What was the condition of the pipe?

A. This T, there was a crack in it, I imagine that long where it was welded onto this pipe.

Q. Where it was what?

A. Where it was welded onto the pipe.

Q. Was there anything coming out of this crack?

A. Yes, sir.

Q. What was that?

A. Kind of a yellow foam, not yellow foam, a gray foam.

(Testimony of Frank Miller.)

Q. Did you have occasion to go back to the yard later, a day or two or days later? A. Yes.

Q. Did you have occasion to notice the pipe again? A. Yes, sir.

Q. What would you state was the condition of the pipe two or three days later?

A. It was still fizzling and coming out of that pipe.

Q. How many days thereafter, if you remember?

A. I don't remember how many days afterwards.

Q. Did you know Oscar before the accident?

A. I met him, I think I helped load him out two or three times when he come over there.

Q. Do you know whether he was a good worker, do you remember?

A. As far as I know, he was always on the job.

Mr. A. L. Maslan: Take the witness.

### Cross-Examination

By Mr. Preston:

Q. Do I understand you were working for Frank Powser until when?

A. We hauled that—I was working at the time we hauled that stuff from the Pennsylvania Salt. I worked for him off and on, a day now and a day then.

Q. When did you start working for Radinsky?

A. The day we loaded this pipe, this coil.

Q. You mean the day you loaded it where? [67]

(Testimony of Frank Miller.)

A. Just about, it was only a couple of hours.

Q. You say you started working for him the day you loaded this. Now, you loaded it two places, at the Powser yard and——

A. It was after it was unloaded. I unloaded it from the Pennsylvania Salt, working for Powser at the yard, and several weeks afterwards I loaded it on for Mr. Radinsky.

Q. When did you start working for Mr. Radinsky?      A. Just that load.

Q. Do you mean by that that you started to work for Radinsky at the time this accident happened?      A. Yes.

Q. On that day, was it?      A. Yes.

Q. And not before?      A. No.

Q. Who employed you?

A. It was between Mr. Powser and Radinsky. There was a mutual agreement between them.

Q. Didn't you have anything to do with it, who you were working for?

A. Mr. Radinsky was the one that was supposed to pay me.

Q. I still don't follow you on that. You mean they just traded you off? [68]

A. No, I wasn't working for Powser either. I just come in the yard.

Q. Who employed you when you came in the yard?

Mr. A. L. Maslan: What day are you referring to?

Mr. Preston: The day he said he started to work

(Testimony of Frank Miller.)

for Radinsky, the day of the accident.

Q. Who employed you at that time?

A. Radinsky.

Q. Was he there? A. Yes, he was there.

Q. At the Powser yard at this time?

A. I think he was.

Q. Are you sure about that?

A. I am pretty sure he was.

Q. What?

A. I am pretty sure he was. He was there and he left.

Q. Do you remember his actually employing you? A. I am pretty sure he did.

Q. Did he pay you?

A. Mr. Powser paid me, and as I understand, he reimbursed Mr. Powser.

Q. Do you have any recollection of Mr. Radinsky saying, "Here, you work for me today" or any condition to that effect, "I am going to hire you today" or anything like that?

A. He wanted to know if I would run the hoist.

Q. Who wanted to know if you would run the hoist? A. Radinsky.

Q. You remember that now? A. Yes.

Q. Where did that conversation take place?

A. In the yard.

Q. Do you remember he was there?

A. Yes.

Q. He wanted you to run the hoist that day?

A. Yes.

Q. Mr. Miller, you spoke of after the accident,

(Testimony of Frank Miller.)

this vapor or whatever — I don't know how you would describe it, whatever it was coming from this pipe, do you remember?      A. Yes, sir.

Q. What part of the pipe did it come from?

A. It come out of this T.

Q. You mean out of the end of the T?

A. No, the T was still on there and it was broke where it was welded onto the pipe.

Q. The T was broken off?

A. After it was hit. The T wasn't, the pipe was broke, the nipple where this T was on was welded into this pipe, into this coil, and when it was hit, it broke the seam in there and let it out.

Q. When it was hit, it broke a seam of the pipe?

A. No, the seam where it was welded.

Q. Where it was welded?

A. Where it was welded into the coil.

Q. Where what was welded onto the coil?

A. This T.

Q. When you first picked that coil up at the Penn. Salt Manufacturing Company, did you notice whether it was capped or not?

A. I never paid no attention to it.

Q. I take it you didn't notice whether it was capped or not?      A. No.

Q. Was the T in the same condition as when you saw it after the accident?

A. All except there where it was opened up.

Q. You didn't notice the T beforehand, did you?

A. Yes, I had noticed the T.

(Testimony of Frank Miller.)

Q. Did you notice whether it was closed or not?

A. I never paid no attention to it.

Q. When you say it was the same, you don't mean that you actually noticed beforehand whether the pipe was closed or not, is that correct?

A. I know it was on there, and that's all.

Q. You said that nothing was done to that pipe, that coil, from the time you unloaded it at the Powser yard [71] until the time of the accident. You didn't watch it during that time, did you?

A. No, sir.

Q. As a matter of fact, you weren't even working for Mr. Powser during that period, were you?

A. No, but I come through the yard.

Q. You didn't examine that coil each time?

A. No.

Q. As a matter of fact, you didn't pay any attention to it from the time you unloaded it until you started loading it up again some three weeks later, isn't that correct?

A. Yes, sir.

The Court: At this point, we will take a recess for about ten minutes.

(Recess.)

The Court: Let the record show all jurors have returned to their places as before the recess, and that all parties on trial with their counsel are present. You may proceed.

Q. Mr. Miller, did you see any tin arrangement over this pipe afterwards to prevent the vapor or



(Testimony of Frank Miller.)

whatever it was from going out, or anybody brushing up against it?

A. I think that was put on right after the accident.

Q. Did you see it? [72] A. Yes, sir.

Q. When was that put on?

A. I think it was put on right after it was taken off.

The Court: After what was taken off?

The Witness: After the coil was taken off the truck.

Q. You mean after the accident?

A. Yes, sir.

Q. By "right after" what do you mean by that?

A. After I lifted it off the truck and laid it on the ground again, I think we put a tin over it.

Q. You mean that was before Mr. Haynes went to the hospital? A. No, afterwards.

Q. How long afterwards?

A. Several hours, I guess.

Q. Did you do that yourself?

A. No, I didn't.

Q. Did you see it done? A. Yes.

Q. Who did it?

A. I think Mr. Russell did.

Q. That was the man that went out and got this coil originally from the Pennsylvania Salt Manufacturing Company? [73] A. Yes, sir.

Mr. Preston: That is all.



(Testimony of Frank Miller.)

Redirect Examination

By Mr. A. L. Maslan:

Q. Are you steadily employed?

A. No, sir.

Q. Do you do odd jobs? A. Yes, sir.

Q. Were you doing odd jobs about the time of the accident? A. Yes, sir.

Q. At the time that you were working for Powser, when you picked up that scrap iron from the Pennsylvania Salt Manufacturing Company?

A. Yes, sir.

Q. Were you working by the week, or was it by the job or by the day? A. By the hour.

Q. Did you get much time in about that time?

A. No.

Q. At the time of the accident, that is the date of the accident, February 20th, do you know how many hours you worked that day?

A. I don't remember. [74]

The Court: Repeat for our convenience where you said you were when the accident happened. Were you anywhere near the place where the accident happened?

The Witness: I was sitting on the hoist, running the hoist.

The Court: You were operating the hoist?

The Witness: Yes, sir.

The Court: Did you witness the occurrence of the accident?

(Testimony of Frank Miller.)

The Witness: Yes, sir.

The Court: You saw it happen?

The Witness: Yes, sir.

The Court: You saw what the plaintiff was doing with the sledge hammer and you saw what happened in connection with his use of the sledge hammer?

The Witness: Yes, sir.

The Court: Is there anything else?

Mr. A. L. Maslan: That's all.

The Court: You may step down.

(Witness excused.)

Mr. A. L. Maslan: Oscar, will you take the stand, please? [75]

### OSCAR VIRGIL HAYNES

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. A. L. Maslan:

Q. What is your name?

A. Oscar Virgil Haynes.

Q. Where do you live?

A. 2710 Yesler Way, Seattle, Washington.

Q. How old are you now? A. I am 23.

Q. Where were you born?

A. I was born in Pittsburg, Kansas.

(Testimony of Oscar Virgil Haynes.)

Q. How long have you lived in the city of Seattle?

A. We moved here from Kansas in 1941, the early part of the year, and I have been here ever since except two years I served in the army.

Q. Was that overseas duty?

A. All except six months of it.

Q. Are you a resident of the city of Seattle?

A. Yes, sir.

Q. How long is it since you have been permanently [76] residing in Seattle?

A. Ever since I came here.

Q. That was in 1941? A. Yes, sir.

Q. Are you working at the present time?

A. No, sir.

Q. Who do you live with now?

A. With my parents.

Q. Who are your parents?

A. Mr. and Mrs. George Haynes.

Q. Is your father working? A. Yes, sir.

Q. Where does he work?

A. He works at B. Radinsky & Son.

Q. The testimony has been that there was this accident on February 20, 1948? A. Yes, sir.

Q. Who were you working for at that time?

A. B. Radinsky & Son.

Q. How long had you been working for them prior to the accident?

A. Since the day after Labor Day, 1946.

Q. How did you happen to get the job there?

(Testimony of Oscar Virgil Haynes.)

A. My father was called there from the union hall to operate the crane in that yard. I drove him to work that [77] morning, and I wasn't doing anything. I just come out of the army the month before, and Mr. Radinsky asked me if I wanted a job. At that time I said, "No. I just come out of the army. I don't believe I would like to go to work so soon," and he says, "Well, I need some help," so he says, "You better take the job." I says, "O. K., I'll go to work," so I went to work the same day my father did.

Q. Did you work from that day steady to the time of the accident?      A. I did.

Q. What type of work did you do?

A. For a while I worked in the yard loading scrap buckets so they could be loaded into the railroad cars, and we moved a lot of paper, big bales that were some six feet tall, and weighed anywhere from 1500 to 2400 pounds. It was heavy work, and then I went to work on the truck.

Q. Were you able to do that heavy work?

A. Yes, sir.

Q. When did you start working on the truck?

A. Well, it was right after I went there. I used to go out with the truck and help load it. At that time, there was another driver. I don't recall the exact date.

Q. Do you recall the day of the accident?

A. Yes, sir.

Q. What was that date? [78]

(Testimony of Oscar Virgil Haynes.)

A. February 20, 1948.

Q. Would you relate the circumstances to the Court and jury, that is, the facts about how the accident happened?

A. We left B. Radinsky & Son, the yard where the truck was parked. At that time, I was driving this semi and I had been for quite some time.

Q. Would you tell the Court and jury what you mean by semi?

The Court: Semi what?

The Witness: It was a semi truck. It had a——

The Court: Do you mean a semi truck or semi trailer?

The Witness: It all comes under semi, sir.

The Court: Semi what? Semi means half, does it not?

The Witness: Yes.

The Court: Half what? Half trailer or half truck, what is it?

The Witness: It was half trailer and half truck. The trailer was 35 feet long, and there was a 5 pound wheel on the back of the tractor that pulled this trailer which was set on there through a king pin. From the trailer that went into the truck and it had a swivel movement, that is the semi truck I was driving for B. Radinsky & Son. [79]

We left the yard about 8:30, February 20th. We were instructed to go to Frank Powser's yard and pick up some scrap iron. At the time, I didn't know what it was. It was just scrap iron. We got to the

(Testimony of Oscar Virgil Haynes.)

yard and they showed us what to take and there was a lot of pipe. There was lots of pipe there. We didn't ask where it come from or anything about it, but this big coil was there and we didn't have no crane to load this big coil. We wanted to get the heavy stuff on the bottom, but it was impossible to do so at that time, so there was some smaller pipe that we loaded by hand, which we was able to do until the time the crane came. Then we loaded the heavy pipe, which was several other pieces besides the big coil, and a great big round—I thought it looked like it might be a boiler or something like that. It went on there too, besides the coil of pipe, but we had another one to go on there and it was pretty heavy and I wanted to get it over the back wheels of the trailer so it would be a balanced load.

A heavy load like that, anywhere from fifteen to eighteen ton, is quite a responsibility on the highway, so I had to get this load fairly even on the truck. We got this coil of pipe on there. Mr. Hubbard, my helper, he was up on the truck. He told me—at that [80] time this sledge hammer was handed up to him and I asked him if he would take the sledge hammer and hit this coil of pipe and move it over so this other boiler would go down in the back of the truck beside the one that was on there, but I was standing closer and I says, "Here, Huston, I'll do it. I'm closer." At that I took the sledge hammer and hit this pipe twice. The second time I hit it, it was just like a shell blowing up in



(Testimony of Oscar Virgil Haynes.)

my face, and it made a big rushing boom noise and it blowed my hat off and it stunned me and the feeling was gone out of my face. I couldn't feel nothing at first and it felt like I had dirt in my eyes, so I went to rub them and my whole face was slick. Then I knew it wasn't dirt, that it was some kind of liquid.

I was standing right by the edge of the truck, so I turned around and just jumped off, in which my legs hit on some other iron which I could not see, but I was—I had to get off the truck from where stuff was coming out. When I hit the ground, it seemed like it jarred all the feelings back in my face, and I never had a feeling hurt me so bad in my life.

Then at that time Mr. Hubbard, my helper, had wiped off his glasses—at that time I did not know he had any acid on him—so he twisted my arms behind me and they was pushing me towards the car and I [81] couldn't see nothing then. I couldn't even close my eyes. They were full of this paste-like stuff and it was burning terrific. Then we got in Mr. Powser's car which I couldn't see. I couldn't see the way to go to the hospital, but we went through town evidently, because I heard the truck right beside us.

We got to the hospital. They still had hold of my arms behind me, and I couldn't get loose. I still had on my gloves that I was working in, my shirt, my clothes. My hat was gone and my hair was full



(Testimony of Oscar Virgil Haynes.)

of that acid stuff and my scalp was burning awful. We got to the hospital room and they began to put water and stuff on my face and it went plumb down my throat, and I tried to spit it out, and at that time the whole lining of my mouth came out where I had opened my mouth, evidently, and it had blowed in my mouth, up my nose and in my right ear. They poured something on my face, I don't know what it was, but after that I could feel it begin to swell up. It swelled up and my eyes swelled shut. My face swelled big enough that it swelled plumb over my right ear, I couldn't even feel it. My nose was swelled plumb over my face. They had a big sock over my head, and an elastic sock of some kind, and it felt like they had taken a whole gallon of vaseline or something and greased my face. They [82] put this sock over my head and pulled some kind of cloth through my mouth, for some reason, I don't know why. That was on there for quite some time.

I couldn't eat for about four days. I was fed through the arms and they gave me pain pills to keep the pain killed and sleeping pills at night so that I would just go to sleep. Finally, my face began to go down, the swelling did. Then they took off the sock.

Q. How long did you stay in the hospital?

A. For 58 days.

Q. Coming back to the accident proper, did you have any knowledge prior to the time you hit that

(Testimony of Oscar Virgil Haynes.)

pipe with the maul that there was any foreign material or caustic or acid in the pipe?

A. None whatsoever.

Q. Was there anything that would lead you to believe that there might be anything in the pipe?

A. No, sir.

Q. Did anyone tell you that there might be something in the pipe? A. No, sir.

Q. You used that maul? Whose?

A. The maul, if I remember, the one we used on that pipe, was the one that we had on the truck. It was kept there for that purpose and we had busted lots of iron with it [83] before.

Q. You say that is the purpose for keeping the maul on your truck? A. Yes, sir.

Q. Why do you use the maul for moving these heavy irons?

A. So we can knock these big pieces apart and get on a good load, a paying load and not come back with a windy load, they call them.

Q. What is a windy load? Would you explain that?

A. A windy load is where there is a lot of space in between, and very little weight, but it adds up bulky.

Q. You say you were in the hospital 58 days?

A. Yes, sir.

Q. Who treated you there?

A. Dr. Cameron treated my eyes at Tacoma. Dr. Jess Read treated my face at Tacoma.

(Testimony of Oscar Virgil Haynes.)

Q. Are you still receiving treatment for your eyes?

A. Yes, sir, Dr. Jensen is looking after them now, of Seattle.

Q. What vision did you have before you suffered this accident?

A. My eyes were perfect, 20-20 vision.

Q. What's that? A. I had 20-20 vision.

Q. How do you know that?

A. They tested in the army, that is the last time I had them tested.

Q. Did you develop any particular prowess with the use of guns?

A. Yes, sir, I was gunner on a tank, 105 howitzer.

Q. What's that?

A. I was a gunner on an M 7 tank in the Philip-pines.

Q. Were you in action there?

A. Yes, sir.

Q. Were you injured in any way, your eyes, there? A. No, sir.

Q. Did you come out of the army with perfect vision? A. Yes, sir.

Q. Did you earn any medals for your prowess as a rifleman in any way?

A. Sharp shooter.

Q. How many types of medals are given in the army, if you know, for shooting?

A. There is three different classes.

Q. What are they?

(Testimony of Oscar Virgil Haynes.)

A. The marksman, sharp shooter, and expert.

Q. Which one did you make of those three?

A. I made the sharp shooter.

Q. Is that considered good in the army? [85]

A. Yes, sir, it is.

Q. And you state you were a gunner on a tank?

A. Yes, sir.

Q. What type of tank?                   A. An M 7.

Q. What type of tank is that?

A. It is a tank that is—that hasn't got no protection from the waist up, and the gun will only traverse about 15 degrees in front, with a 105 howitzer on it. To shoot to the rear, you have to turn the whole tank around.

Q. You were a gunner on that tank?

A. Yes, sir.

Q. Did that necessitate the use of good eyes?

A. Yes, sir, it did.

Q. Were you tested for your eyes before you were given that job?

A. Not particularly, except before we went overseas.

Q. What's that?

A. Not particularly for that certain job, but before we went overseas we were given a thorough examination.

Q. Were you in active combat?

A. Yes, sir.

Q. How long?                   A. For about five months.

Q. What unit were you in? [86]

(Testimony of Oscar Virgil Haynes.)

A. I was with the 35th Regiment of the 25th Division.

Q. They saw war service in the Philippines, did they not?      A. Yes, sir.

Q. What was your health before the accident?

A. I was in perfect shape. There was no defects about me.

Q. What's that?

A. There was no defects about me.

Q. What rating did you have when you got out of the army?

A. I come out a staff sergeant.

Q. How old were you when you got out of the army?      A. I was 20.

Q. What education have you had?

A. I had two years of high school.

Q. When did you get into the army?

A. August 9, 1945.

Q. Was that 1945 or——

A. Excuse me, 1944.

Q. When did you get out of the army?

A. August 20, in 1946.

Q. When did you start working for Mr. Radinsky?

A. The day after Labor Day, September in 1946.

Q. Prior to getting in the army in August, 1944, what [87] work did you do?

A. I worked in the shipyards, Lake Washington Shipyards.

Q. How long did you work there?

(Testimony of Oscar Virgil Haynes.)

A. For a little over a year.

Q. How old were you when you worked in the shipyards?

A. I was 17 then. Prior to that, I worked at the Bremerton Navy Yard.

Q. How old were you then?

A. I started to work there right after I was 16.

Q. Was that the first job that you had, at the Bremerton Navy Yard?      A. Yes, sir.

Q. What high school did you go to in Seattle?

A. Garfield.

Q. How long did you go there?

A. About a year.

Q. Prior to getting work in the shipyards, Navy yard, what type of work did you do?

A. I went to school up to that time.

Q. Did you do any work before that?

A. Yes, sir, on the farm.

Q. Where was that?      A. In Kansas.

Q. Are you able to do any work now? [88]

A. No, sir, I haven't been.

Q. You have some vision left, do you not?

A. Some, yes.

Q. Can you see the features of the jurors to your left, Oscar?

A. The first ones here on the end, I can, but I can't down there.

Q. Down where?

A. I can see to the man with the brown suit on, I believe.

(Testimony of Oscar Virgil Haynes.)

Q. Can you see the gentleman in the second row, the last gentleman there?

A. I can see his white necktie, white shirt.

Q. Do you know the color of the necktie he is wearing?      A. No, sir.

Q. Can you see me?

A. I can just see your form.

Q. Can you tell it is I?

A. Excuse the expression, yes.

Q. How can you tell?

A. By your bald head.

Q. Can you read the newspaper now?

A. No, sir, I can't.

Q. You were recently examined by your eye doctor. Could you read that large E that they usually have on those [89] eye charts?

A. The very large ones, I could see.

Q. How close were you, do you remember?

A. Not too far away, I don't know exactly, no.

Q. How much were you making working for B. Radinsky?

A. From 80 to 90 dollars a week.

Q. At the time of the accident, that is, prior to the accident, immediately prior?

A. Yes, sir.

Q. Do you know how much you made, that is, earned in the year 1947?      A. Almost \$3000.

Q. What did you do with your money?

A. Most of it went to my home.

Q. What home is that?



(Testimony of Oscar Virgil Haynes.)

A. Where my mother and father live.

Q. You live with your mother and father?

A. Yes, sir.

Q. How many children in the family?

A. Seven of us.

Q. Are you the oldest?           A. Yes, sir.

Q. Is your eyesight, as far as you could see, getting any better?

A. It might be getting a little better. They are getting more even, the eyes are.

Q. What do you mean by that, Oscar?

A. The sight is, well, more or less—both eyes are getting to see fairly the same, but the right eye is a lot stronger than the left one yet.

Q. Does the difference in weather affect your eyes in any way?

A. Yes, sir, a great deal.

Q. In what way?

A. On a real bright sunny day, I can't see nothing. It fades out.

Q. What happens on cloudy days?

A. I can see a little. It shuts out the glare.

Q. Can you see your way around your own home?           A. Yes, sir.

Q. Can you make your way around your own home?           A. Yes, sir.

Q. What do you do during the day?

A. Just stay home.

Q. Do you occupy yourself in any way?

A. Well, I don't get up too early.

(Testimony of Oscar Virgil Haynes.)

Q. Do you listen to the radio?

A. Yes, sir.

Q. Were you very active before the accident?

A. I thought so. [91]

Q. I am referring to your face now. Has that cleared up pretty well by now?

A. Some of it has. There is some there that won't go away. It will always be there.

Q. Would you refer to that and point to it and tell us about that if you can?

A. This along where my nose is, here around my nose, and cheek, and the side of my mouth.

The Court: On which side of your face?

The Witness: On the right side and on the left side of my nose and on my forehead. Those are permanent, especially the one on the left side of my forehead.

Q. Is your face more painful sometimes than others, other days?

A. Yes, sir, it is.

Q. Do you have any reason for that, as far as you know yourself?

A. Except every so often, those places, those scars, will break out like a boil and they are very sore.

Q. Do you still do that?

A. Yes, sir.

Q. How often would you say that happens?

A. That happened about three weeks ago.

Q. How long do those boils or sores remain?

A. They stay there seven or eight days.

Q. Is it painful, are these boils painful?

(Testimony of Oscar Virgil Haynes.)

A. Yes, sir, they hurt very much.

Q. What's that? A. They hurt very much.

Q. Have you earned any money since you have been injured? A. No, sir.

Q. Was any other part of your body injured?

A. The back of my arms were.

Q. Would you indicate it?

A. The back of this arm was burned, where the sleeve came down to, and my glove didn't quite meet it.

Q. Would you show that to the jury?

A. This one not so much (indicating) across the back here.

Mr. A. L. Maslan: Your Honor, may the bailiff present the plaintiff to the jury?

The Court: You may stand in two or three different positions before the jury.

The Witness: That is where it burned, on the back of my wrist.

The Court: Do not use any words, just exhibit the arm or arms.

Q. Would you show the jurors the scars on your face [93] near your nose so they can look at them? I notice you opened your mouth. Why did you do that?

A. Because that is drawn together, and it has drawn on my eyelids.

Q. Is that painful?

A. It hasn't hurt so much now, but it was very much when I opened my mouth.

(Testimony of Oscar Virgil Haynes.)

Q. When you were in the hospital, what treatment did the doctors give you after the first few days?

A. They used penicillin packs on my face a lot, and for my eyes I don't know what it was.

Q. How long after you came home, which was in April, the 18th, 1948, were those scabs still on your face, do you remember?

A. Yes, sir. They was there until about the middle of August, or the last.

Q. Of what year?

A. Of the same year.

Q. And your face has been somewhat like this since that time?      A. Ever since.

Q. How long was it after you were brought to the hospital that you actually regained consciousness so that you could think as to what your position was?

A. It seems about two weeks. [94]

Q. Do you remember what your feelings were at that time?

A. Do you mean up to that point?

Q. As soon as you were able to think about your situation, what were your feelings?

A. I was scared because I couldn't see nothing, and I figured I was going to be that way all my life.

Q. Do you feel better now about your position?

A. Somewhat.

Q. What were you wearing at the time of the accident?

A. I was wearing an Army shirt that I had

(Testimony of Oscar Virgil Haynes.)

brought home from the service with me, that we were discharged in, and a pair of pants, what they call tin pants out here in the northwest for rainy weather, very heavy cloth.

Q. Were you wearing gloves?

A. Yes, sir, I was wearing leather gloves.

Q. Did you wear a hat?

A. A bill cap and a pair of Army combat boots that I had also brought home with me.

Q. Since the time of the accident, have you been engaged in any type of work at all, Oscar?

A. No, sir.

Q. Why is that?           A. I can't trust myself.

Q. How is your health outside of the face and eyes? [95]           A. Fine.

Q. Have you ever been sick?           A. No, sir.

Mr. A. L. Maslan: Take the witness, counsel.

### Cross-Examination

By Mr. Preston:

Q. How long had you been working for Radinsky & Company at the time of this accident approximately?

A. From Labor Day, 1946, until February 20, 1948.

Q. Approximately a year and a half?

A. Yes, sir.

Q. During that time, you were doing trucking and also working in the yard?           A. Yes, sir.

(Testimony of Oscar Virgil Haynes.)

Q. Do you know whether or not you were carried on the rolls of B. Radinsky Company as a workman engaged in extra hazardous employment? Do you know that yourself?

A. I knew I was covered by insurance.

Q. By workman's compensation insurance?

A. I believe that is what they call it.

Q. The state law, in other words?

A. Yes, sir.

Q. During the year and a half, do you know whether or not your employer, B. Radinsky Company paid premiums? [96]

Mr. Ben Maslan: I think that is a question that was going to be reserved for discussion.

The Court: That subject was to be reserved, as I understand it.

Mr. Preston: I can ask him later about that, if necessary, so I will not cover that point at this time.

Q. Mr. Haynes, just before the accident, did you hear your helper, Mr. Huston Hubbard, discussing with someone else the question about this coil, whether or not it had been flushed out?

A. No, sir. I was some distance from him.

Q. Do you recall that they were discussing something about the pipe? A. Not them two.

Q. You don't remember?

A. Mr. Powser was talking to somebody else, a man that I didn't know.

Q. Since you got home from the hospital, have



(Testimony of Oscar Virgil Haynes.)

you done anything about going to school to help your condition, occupy yourself and learn things at Edison or Broadway, those schools that help you out when your eyesight is not good?

A. No, sir, not now.

Q. Have you at all? A. No, sir. [97]

Q. What they call, I believe, occupational therapy or anything like that? A. No, sir.

Mr. Preston: That is all.

Redirect Examination

By Mr. A. L. Maslan:

Q. That load that you went to take from the Powser yards, was that the first load that you had taken of this pipe and various other scrap materials? Had you taken other loads from the Powser yard?

A. Yes, sir, we had taken numerous loads from there.

Q. The immediate few days before the accident?

A. Yes, sir.

Q. Did those loads also consist of pipe and various other materials? A. Yes, sir.

Q. That is, different pipe materials and scrap?

A. Yes, sir.

Mr. A. L. Maslan: That is all.

The Court: You may step down.

(Witness excused.)

The Court: Call the next witness. [98]



## WILLARD BAARSTAD

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

## Direct Examination

By Mr. A. L. Maslan:

Q. What is your name, please?

A. Willard Baarstad.

(Photograph marked Plaintiff's Exhibit 14 for identification.)

Q. Where do you live?

A. 6556 Dibble Avenue, N. W.

Q. Willard, is it? Oscar called you Willie.

A. Yes.

Q. Do you know Oscar Haynes?

A. Yes, I do.

Q. How long have you known him?

A. Since August, 1944.

Q. How did you first become acquainted with him?

A. We were inducted into the Army at the same station, the Field Armory.

Q. I beg your pardon? [99]

A. We were inducted in the Army at the Field Armory the same day.

Q. How old were you at that time?

A. Eighteen.

Q. Was he the same age? A. Yes.

Q. Did you serve with him in the Army?

(Testimony of Willard Baarstad.)

A. Yes.

Q. Did you take your indoctrination course together?      A. Yes.

Q. Where was that?

A. Fort Lewis, Washington.

Q. How long were you together with him there?

A. Approximately three weeks, I guess, two or three weeks.

Q. Where did you go from there?

A. Camp Roberts, California.

Q. Did he go down there with you?

A. Yes.

Q. How long did you serve at Camp Roberts together?      A. Approximately six months.

Q. What happened thereafter?

A. Well, we went on furlough before entering service overseas.

Q. Did you get overseas the same time as he did?

A. No, I left January, 1945.

Q. When did you next see Oscar Haynes?

A. The latter part of March, 1948.

Q. Where did you then see him?

A. In the 35th Regiment of the 25th Division.

Q. Where was that?      A. On Luzon.

Q. Had you been in active duty, that is combat duty already?      A. Yes.

Q. When did Oscar Haynes come to your outfit?

A. The latter part of March, 1945.

Q. Where was that?      A. On Luzon.

Q. Is that the island of Luzon?      A. Yes.

(Testimony of Willard Baarstad.)

Q. Is that in the Philippines? A. Yes.

Q. Did you see Oscar often from March when he came into your outfit to the end of the war?

A. Yes.

Q. Under what occasions did you happen to see him? A. Well, I was a cook at the time.

Q. What's that?

The Court: A cook, is that what you said? [101]

The Witness: Yes. I was a cook at the time he joined our outfit and he became a gunner on an M 7 and he would go out on missions in the morning. I seen him before he left and I seen him when he returned in the evening.

The Court: What materiality has this, Mr. Maslan?

Mr. A. L. Maslan: I wanted to show his physical condition, how active he was, Your Honor, and the type of person he was prior to this accident. Here is a young man who served with him for two years.

The Court: Is there any dispute of that, any issue of that, that he was active beforehand?

Mr. A. L. Maslan: There may be. I think that is plaintiff's case, your Honor.

The Court: Get at it briefly.

(Photograph marked Plaintiff's Exhibit 15 for identification.)

Q. I am handing you Plaintiff's Exhibits 14 and 15. Would you tell the jury what those two exhibits are? Do you remember that picture? Ex-

(Testimony of Willard Baarstad.)

hibit 14?      A. I don't remember Exhibit 14.

Q. Can you identify any of the people in that picture?      A. Yes.

Q. Who are they? [102]

A. Well, I am one of them, one is George Crofton, one is Oscar Haynes, and the other is Lewis B. Anderson, all in the same outfit.

Q. All soldiered together?      A. Yes.

Q. Do you remember where that picture was taken?      A. Exhibit 14?

Q. Yes.

A. No, I don't quite recall the time.

Q. Take a look at the other exhibit, Exhibit 15?

A. Exhibit 15 was taken in Japan.

Q. Who was in Exhibit 15?

A. Myself and Oscar Haynes.

Q. Looking at Exhibit 14, is that a fair representation of Oscar when you were in the Army together?      A. Yes, it is.

Q. How about Exhibit 15?

A. Yes, that is also.

Q. To your knowledge, was Oscar very active?

A. Yes, he was quite active.

Mr. A. L. Maslan: I offer these two exhibits in evidence.

Mr. Preston: They are cumulative, if Your Honor please.

Mr. A. L. Maslan: That is all we have. [103]

The Court: Is this all you have?

Mr. A. L. Maslan: Yes, Your Honor.

(Testimony of Willard Baarstad.)

The Court: These two are admitted, Plaintiff's Exhibits 14 and 15.

(Plaintiff's Exhibits 14 and 15 received in evidence.)

Q. To your knowledge, was he good with guns, the use of guns?      A. Yes, he was.

Q. Were his eyes in good condition, to your knowledge?      A. To my knowledge, they were.

Q. What makes you come to that conclusion?

A. Well, we went through training together. We would go out on these ranges, firing ranges, and he usually made a pretty good score.

Q. Was he your superior officer, non-commissioned officer?

A. He was in Japan for some time.

Q. What's that?

A. He was in Japan for a few months.

Q. What rating did he finally make over there?

A. Staff sergeant.

Mr. A. L. Maslan: Take the witness, counsel.

Mr. Preston: No questions. [104]

The Court: Step down.

(Witness excused.)

The Court: Call the next witness.

JACK RADINSKY

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. A. L. Maslan:

Q. What is your name, please?

A. My name is Jack Radinsky.

Q. What business are you in?

A. We are in the waste materials business.

Q. Do you have any specialty of waste materials?      A. Scrap paper and scrap iron.

Q. Where is your business located?

A. 2750 Fourth Avenue South.

Q. Under what name?

A. B. Radinsky & Son.

Q. Where do you live?

A. 615-33rd Avenue, Seattle, Washington.

Q. Who is B. Radinsky?

A. B. Radinsky is my father. [105]

Q. And you are the son that is in the company?

A. That's right.

Q. Do you know Oscar Haynes?

A. Yes, I do.

Q. Do you know the Haynes family?

A. Yes, I do.

Q. Is the father still working for you, George Haynes?      A. Yes, he is.

Q. How long has Oscar been working for you?

(Testimony of Jack Radinsky.)

A. Well, Oscar worked for us from early in September until the date of the accident.

Q. Of what year? September of what year?

A. 1946 until February 20, 1948.

Q. Under what circumstances did he come to work for you?

A. We were in need of a crane operator. We called up the union hall. They sent down Mr. George Haynes. Accompanying Mr. George Haynes was his son, Oscar, and we asked Oscar to come to work for us, too.

The Court: From what date? Will you repeat for our convenience the dates from which to which he worked for you?

The Witness: From the first week of September until February 20, 1948.

The Court: September of what year? [106]

The Witness: 1946.

The Court: September, '46, until February, 1948, is that right?

The Witness: That's right.

Q. Would you state the circumstances of his going to the Powser yard to pick up some iron for you on February 20, 1948?

A. All through the year 1947, we had been picking up scrap iron from Mr. Powser. There were many, many loads, possibly amounting to 500 tons, and on that particular day Oscar Haynes was instructed to go to Tacoma along with his helpers to pick up what was possibly the last load of this



(Testimony of Jack Radinsky.)

particular transaction. He left early in the morning.

The next I heard of Oscar was when the telephone rang approximately 12:15 of that day. My father answered the telephone in my presence. It was in our office, and a Tacoma doctor was on the other end of the line. He said that Oscar was hurt, that he wanted to see us, this doctor wanted to see us at the Tacoma General Hospital.

We ran out to my father's car and by driving at an excessive rate of speed, approximately 90 miles an hour, we managed to reach the hospital in 25 minutes from our place of business. While my father was talking to the doctor I went in to Oscar's room. I saw that he was being held down by some nurses to keep him from rubbing his eyes and that he [107] was crying, "I want my daddy." That is all he was saying, he wanted his father.

Then after that I went out into the hall and I saw Mr. Powser in a state of great excitement. We were all rather excited, and he kept repeating the fact that there was blood in his car. He wanted me to come out and take a look at the blood that was on the floorboards of his car, and I went out with him and I saw that there was blood on the floorboards of his passenger car.

Then after that I went back and talked to the doctor. The doctor didn't know whether it was lye or sulphuric acid. Then I remember the nurse coming in and said, "Doctor, I think he swallowed some of that stuff," and the doctor said, "Oh, my

(Testimony of Jack Radinsky.)

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(Testimony of Jack Radinsky.)

God," and then my father and I went back to the Powser yard. We noticed that the coil was still on the truck and we ordered the coil to be taken off. Then I got into the truck and I drove it back to Seattle. As I parked the truck in our yard, I noticed that the acid had eaten off the paint off the rear end of the truck. My father and I visited Oscar every chance we could and he didn't seem to be comfortable at all for three weeks. He seemed to me to be in great pain. It was only at the end of the third week that he was able to relax at all.

Q. Did you have occasion to see him at a later date in the hospital? [108]

A. Yes, I visited him several times after that.

Q. What was his condition on the later dates?

A. Well, in the first two or three weeks, his face was so swollen that he was hardly recognizable, but at the later dates his face returned to its normal shape, but his vision was very poor. He could hardly see at all out of one eye. Then I visited him, I believe, the Sunday when he was to be taken home.

Q. What type of a worker was Oscar?

A. Oscar was a good worker.

Q. Did he have any bad habits to your knowledge?

A. To my knowledge he did not smoke or drink.

Q. Was he always on the job?

A. Yes, he was very punctual. He performed his duties cheerfully, he cooperated with both my father and myself and the other employees.

(Testimony of Jack Radinsky.)

Q. What were the nature of his duties?

A. At the beginning, he was what is known as a hook tender, in other words, he put slings around heavy material that was to be lifted by the crane. Then afterwards when we saw that Oscar Haynes had certain capacities that could give him a good future in our business, my father and I tried to shift him around in various departments so that he could learn the business better with a view to assuming a managerial capacity afterwards. [109]

Q. How many employees did you have at your place?

A. Now or at the time of the accident?

Q. At the time of the accident, how many did you have?

A. At the time of the accident we had 20.

Q. How many do you have now?

A. We have 12 now.

(Payroll records marked Plaintiff's Exhibits 16, 17 and 18 for identification.)

Q. Would you peruse Exhibit 16? That shows the earnings, I believe, of Oscar Haynes for the year—what would you state that exhibit is, please?

A. This is the record—this is our payroll record of Oscar Haynes for the year 1947.

Q. What did he earn in the year 1947?

A. He earned \$2996.81.

The Court: What year was that?

The Witness: In 1947.

(Testimony of Jack Radinsky.)

Q. In the first six weeks of 1948 from January 1st to February 20th, 1948, what did Oscar earn working for you? A. He made \$550.20.

The Court: What period?

Mr. A. L. Maslan: From January 1, 1948, to February 20, 1948, at the time of the accident. [110]

May it please Your Honor, may this witness be excused for a few minutes? Dr. Jensen is here.

The Court: Yes, the witness may be withdrawn from the stand and you may call the doctor.

# DR. CARL JENSEN

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

## Direct Examination

By Mr. A. L. Maslan:

Q. What is your name, please?

A. Dr. Carl Jensen.

Q. How long have you been practicing medicine?

A. In Seattle since 1934.

Q. Where before that?

A. As a resident surgeon in Philadelphia and in Baltimore since 1931.

Q. You have a specialty, Dr. Jensen?

A. Yes, sir, ophthalmology.

Q. I beg your pardon?

A. Ophthalmology or eye work, eye surgery.

Q. You do only eyes now, don't you? [111]

A. Yes, sir.



(Testimony of Dr. Carl Jensen.)

Q. How long have you been engaged as an eye surgeon and doing eye work?

A. Since 1932.

Q. What school did you graduate from?

A. University of Maryland.

Q. As a medical graduate? A. Yes, sir.

Q. Where did you do your specialty work in eye work?

A. Wills Eye Hospital, Philadelphia, 1932 to 1934, and further post graduate work in 1936 and 1938 in Europe.

Q. What city?

A. Various cities, Vienna, Utrecht.

Q. Did you specialize in eye work while you were in the service? A. Yes, sir.

Q. How many years of that did you have?

A. Three and a half years.

Q. You were in the Navy? A. Yes, sir.

Q. Did you have occasion to treat Oscar Haynes?

A. Yes, sir.

Q. For his eye difficulty? A. Yes, sir.

Q. Would you state when you first had occasion to [112] treat him?

A. He was first seen in my office April 19, 1948.

Q. How did he happen to come to you?

A. He was referred to me by Dr. Walter Cameron of Tacoma, I presume because it was more convenient to be treated in Seattle than in Tacoma.

Q. What condition did you find his eyes to be in at that time, April 19, 1948?



(Testimony of Dr. Carl Jensen.)

A. When he was first seen, at that time he showed the late results of the burns of his face and also the burns of his eyes, that is, of the surface of his eyes, the cornea, and there was no treatment indicated at that time other than time. In other words, time was the chief factor in healing. There was no medication particularly involved from my standpoint.

Q. What did you find, that is, what damage did you find to the eyes?

A. At that time, there was rather extensive cornea changes, irritation of the cornea, that is the front surface of the eye, with considerable redness due to new vessels forming there, but this condition gradually subsided leaving chiefly a scar of both corneas well towards the center of the cornea. His vision, the last vision taken on November 9th, showed a vision of 22 hundredths in the right eye and slightly less than 22 hundredths in the left eye. This [113] vision is slightly improved in the dark where the pupil has an opportunity to dilate and it becomes a little bit worse in brighter light when the pupil contracts and the scar is more definitely over his direct line of vision.

Q. How much loss of vision, if any, would you say he has sustained to his eyesight.

A. At the present time based on 22 hundredths, under the state law, that would be classified as 80 per cent loss of vision, under the state of Washington ruling.

(Testimony of Dr. Carl Jensen.)

Q. In relation to industry, what is his incapacity to see, Doctor?

A. With his present vision, he would be classed as industrially blind.

Q. What is the present prognosis as far as you could ascertain from your treatment of the boy?

A. It is rather difficult to estimate what his final vision will be. I feel that that should improve with time without any treatment. In other words, he has about another year to go where there should show some definite improvement in that the scar should contract.

If that does not work, there are other things that can be done. One is some beta radiation, a deep form of radium therapy to dry up those blood vessels and cause the scar to contract. The last alternative would be to do a partial keratectomy or a partial corneal transplant, which [114] probably would likely improve, but he certainly should have some improvement of vision over what he has at the present, but it may take quite a while. I do not think surgery should be contemplated for at least a year, if at all. That is something you cannot determine until the year is up.

Q. You saw him first in April of 1948?

A. Yes, sir.

Q. And you saw him last November 9, 1949?

A. Yes, sir.

Q. A year and a half later. Did you see any

(Testimony of Dr. Carl Jensen.)

marked improvement in his vision in that length of time?

A. No, sir. His vision did improve from the very first visit, but his vision was checked on January 1st or the first part of January, I don't have the exact date, 1949. His vision was 20-70 in the right eye and 21 hundredths in the left. His vision apparently became worse in the interim. That, of course, doesn't mean too much. It does show that his vision hasn't improved, but I still feel that his vision should improve with time.

Q. Even though it will improve somewhat, will there nevertheless be impaired vision?

A. I think so, yes, sir.

Q. And your thoughts about improvement are still speculative as far as you can see?

Mr. Preston: I object to that as leading. [115]

The Witness: Yes, sir.

The Court: The objection is sustained.

Q. Would you say that your statement, Doctor, that the eyesight might improve is based on any definite foundation of fact, or what leads you to that conclusion?

A. The fact that there is a scar over the center of his cornea, and most scars of that type do tend to contract. It is true he will have a definite loss of vision but it is impossible to guess how much loss there will be at this time. One can assume that at present there is quite a little loss of vision.

(Testimony of Dr. Carl Jensen.)

Q. Would you say that it is possible that the vision may not improve?

A. Yes, sir, that is possible.

Q. You mentioned a partial corneal transplant, is that the word?      A. Yes, sir.

Q. Would you explain that to the jury, please, and what the chances are of success in that type of operation?

A. Well, there are two types of corneal transplant. One is a full thickness transplant where one takes about a five to six millimeter section of an eye, in other words, an eye that has been obtained from an eye that is to be removed as a result of a tumor, or at least it has to be removed, or an eye from some person that has just died. [116] That is a full thickness and that is sewn in place of—the scar is removed and then this portion of cornea is sewn back in place.

A partial keratectomy is where one takes—instead of going completely through the cornea, they take a half layer or three-quarter layer of cornea and that in turn is inserted in a similar bed on the receiving eye. The reason for the partial corneal transplant, it is recently—the later work has shown that they are a safer procedure and the results have been probably a little bit better than the full thickness corneal transplant.

Q. Are the results guaranteed?

A. No, sir.

Q. By that, what do you mean?

(Testimony of Dr. Carl Jensen.)

A. Statistics show probably 50 per cent improvement, 50 per cent success.

Q. Would you say it is possible that even this corneal transplant may not be successful?

A. Yes, sir.

Q. Is there any pain to Oscar as far as you know, in his eyes at the present time?

A. I don't believe there should be any pain.

Q. From your history and from your conversations with Dr. Cameron, are you familiar with the type of injury Oscar sustained? [117]

A. Only to the extent that I understand he had—acid was blown into his face with the resulting surface burn of his face and eye.

Q. From your experience as an eye man, would you say that acid burns in the eye are painful?

A. I should imagine it would be extremely painful.

Mr. A. L. Maslan: You may take the witness.

### Cross-Examination

By Mr. Preston:

Q. As I understand it, what is causing this impairment of this lad's vision is this scar?

A. Yes, sir.

Q. And you feel, do you not, as I understood your testimony, that give nature another year and that scar should contract, by that I mean become smaller and consequently the vision would be improved by that? A. Yes, sir.

(Testimony of Dr. Carl Jensen.)

Q. Is there any reason you have for believing that that will not happen, that that will not follow in this case?

A. Yes, because it is impossible to determine ahead of time the extent of—we will call it the contracture and absorption or disappearing of a scar.

Q. Possibly you didn't understand my question.

A. It is an impossible thing to predict how much contracture you will get.

Q. Possibly you didn't understand my question. My question was, is there anything that would indicate to you, make you believe now that that is not going to happen, that the scar will not contract?

A. The only thing that one would feel that it is not going to contract further is the time. It is true the time already has been, we will say—the acute phase has been finished. In other words, the acute phase, for the first few months the eye was very red and painful, very red, we will say, showing considerable reaction. After a while it goes into a subsiding stage where the blood vessels that have come in as healing agents gradually disappear and, we will say, withdraw. They draw back to the certain portion of the eye we speak of as towards the limbus. In that process, the scar, we will say, shrivels or tends to thin out and disappear. In this case, it has not done that completely although it has shown a vast improvement from the amount of scar there when I first saw him.



(Testimony of Dr. Carl Jensen.)

Q. Is there anything, any reason why that improvement should not continue?

A. The time element. In other words, this first year has been—the greatest portion of that contracture will take place during that first year, we will say, and from then [119] on another year, another year and so on, there will be continued contracture of the scar.

Q. That is what you normally expect, isn't it?

A. Yes, sir.

Q. And that is one reason why, I suppose, you wait before you do any operating, is to see what nature will do in this ensuing year to help you, isn't that about it?

A. Yes, sir.

Q. What was the name of the operation you do to remove the scar?

A. Keratoplasty or keratectomy. Kerato is another word representing the cornea. In other words, it is a Greek word that has been used. The two words, cornea and kerato are used together, intermingling.

Q. Is that an unusual operation or is it one such as you yourself find occasion to perform fairly often?

A. You wouldn't say often, probably one or two a year of that particular type.

Q. It isn't what you call a rare operation?

A. Not any more.

Q. Counsel asked you if you could guarantee that. I don't imagine doctors guarantee the results of any operation?

A. No, sir.



(Testimony of Dr. Carl Jensen.)

Q. Is that what you meant? [120]

A. Yes, sir. In doing keratoplasty, I am speaking from statistics, 50 per cent of them will cloud over after you have removed—in other words, the clear section that you replaced to the eye will cloud over just as bad as the section that you had removed originally.

Q. You, of course, haven't any way of telling whether this would be successful or unsuccessful?

A. No, sir.

Q. You would speculate, I presume, either way?

A. Yes, sir.

Q. But assuming that it was successful, would it improve the young man's vision?

A. Yes, sir.

Q. I believe you said that it would still leave it impaired, but I am not certain in my own mind I understood you as to whether the improvement would be a great deal or merely slight?

A. If it were a good clear perfect result, his vision would come back to within 5 or 10 per cent of normal.

Q. That is, if you got a good——

A. A good result. Maybe some cases go completely back to normal.

Q. Do you get good results sometimes from those operations?

A. Yes, sir, but that, as I say, you refer back to within 5 per cent of normal vision or even better than that. You can return to 20-20 vision which is

(Testimony of Dr. Carl Jensen.)

considered normal. We will say that is a normal sight.

Q. I take it that this young man can look forward, at least hope for an operation which will bring his vision back to practically normal?

A. That is possible. I must say one thing in this, that if his vision does improve to, say, 20-60 or 20-70, which is, we will say, a fair workable vision, although it is slightly impaired, the general feeling among the eye men now is that one shouldn't do a keratoplasty operation for the simple reason there is that slight danger of having a failure. In other words, if a man has a practically useful vision, they wouldn't feel it would be justifiable to subject him to an operation that has a certain amount of danger to it.

Q. In other words, if nature within the next year reduces that scar so that the young man has—did I understand you to say 20-60?

A. 20-60, 20-50, workable.

Q. Then—— A. Forget it.

Q. Forget it, because I guess a lot of us have just that, haven't we?

A. Not a lot, lots of people have, they get along very well, 20-60. You could probably—you should have to have some type of magnifying lenses or magnification, thick lenses of some sort.

Q. You mean he would have to wear glasses?

A. It would be more than glasses with 20-60. To read well, you have to have 20-20 to 20-30 vision.

(Testimony of Dr. Carl Jensen.)

Q. Do you mean without glasses?

A. With or without glasses.

Q. Would glasses correct 20-60?

A. No, if he had 20-60, I am speaking of that as his best corrected vision. I meant his corrected vision would be 20-60, and that isn't quite satisfactory to read ordinary print unless one used some type of magnifying, something that would increase the image that he is reading.

Q. Would a man with that vision, in your judgment, in your experience, be industrially employable such as trucking and so forth, hard work?

A. It depends on the type of employment. There are many types of employment that he would be able to carry on. I do not think they would allow him to drive a truck with 20-60. I think the state law now is better than 20-50, correctible to better than 20-50. Even that is—well, skip that.

Q. Eliminate the trucking. Otherwise, would you say——

A. I would feel there are many occupations that could [123] be carried on.

Q. Is the operation you spoke of, is that the same thing as iris?

A. Iritectomy. I didn't get into that phase of it. An iritectomy could be done. That is a kind of widening the pupil, bringing an opening to the side of the scar.

Q. Would that show——

A. There is a possibility of that improving his

(Testimony of Dr. Carl Jensen.)

vision. That would be another possibility that would have to be checked.

Q. Is that an operation that is done fairly often?

A. Yes, sir.

Q. With good results?

A. It is a simpler operation, and in the right eye, if the scar appears to be in the right spot, sometimes they gain quite a bit of vision.

Q. In your judgment would that be another possible solution?

A. That is a possibility that would have to be checked in about a year, and that may be a very likely possibility in his case.

Q. I didn't quite understand. Would such an operation as that if successful produce any better results than the one you first spoke of? I don't know the name.

A. It depends on the extent. If his scar contracts [124] some more, then the iritoectomy operation would be very advisable. If it does not, then you have to resort to a corneal transplant, for the simple reason that in doing your iritoectomy you don't have quite enough clear area left to let the person see through out of that new pupil. We will call it that, that is what it amounts to, a new pupil in the eye.

Q. In either event. your best judgment would be to wait this year and see how nature behaves?

A. My recommendation would be that he wait,

(Testimony of Dr. Carl Jensen.)

and he can have a beta radiation or X-rays sometimes. They use beta rays over X-rays.

Q. You mean those are methods of helping nature in the meantime?

A. Yes. Then at the end of that time, one would have to determine whether an iritoectomy would be of any value.

Q. Have you prescribed for him these aids to nature?  
A. Not yet, no, sir.

Q. Have you been treating him right along?

A. I have been observing him. There hasn't been any treatment indicated.

Q. But you feel that now is about the time to start?

A. I think most any time. As a matter of fact, I hadn't seen him for a month or so, but I would say in a month or two it would be well to start that.

Q. These aids to nature's contracture?

A. Yes.

Mr. Preston: That is all.

### Redirect Examination

By Mr. A. L. Maslan:

Q. But as you stated, all of these treatments that you indicate, all of these keratoplasties and iritoectomies and beta ray treatments, or any improvement that might be garnered by the use of these various operative techniques are still all possibilities, aren't they?

(Testimony of Dr. Carl Jensen.)

Mr. Preston: Objected to as leading and suggestive.

The Court: The objection is overruled, but avoid all possible leading. You should say is it or is it not a fact that so and so. That would be one proper way of doing it, perhaps better than the way you last used. Try to avoid unnecessary leading.

Q. Is it not a fact that these keratoplasty operations and iridectomies counsel mentioned and beta ray treatments that may be given still might result is no assistance to the eye vision?

A. That is possible, that is always possible.

Q. And you mentioned that this keratoplasty that you might suggest in a year from now is at best no more than a [126] 50 per cent cure of vision, is that not so?

A. Yes, sir, according to statistics.

Q. And that there may develop a cloudiness by this operation which will make for an unsuccessful operation?

A. That is always a chance one would have to take.

Q. When that happens, would the slight vision that he has become worse or would it remain as it is?

A. It would probably remain as is. It could—anything can happen, of course—it could get worse but that is rather remote.

Mr. A. L. Maslan: That is all.



(Testimony of Dr. Carl Jensen.)

Recross-Examination

By Mr. Preston:

Q. In other words, as I understand it, if these operations or either of them are performed, the young man doesn't stand to lose what vision he has?

A. Yes, sir.

Q. Does he stand to lose it or do you expect him to lose it? Is he taking a chance, that is what I am getting at, too much of a chance?

A. I think whatever doctor does it would be very cautious and minimize that chance, but there is always a chance of failure of any operation. Infection may come on, and in other words, a person to go into an operation of that [127] type should be advised of the seriousness of it.

Q. My question is prompted by counsel's suggestion, perhaps if this operation wasn't successful that he wouldn't retain the vision that he has, but would lose that, and I understood you to say that wasn't necessarily probable?

A. That is rather unlikely, that he would lose further vision.

Mr. Preston: That is all.

Redirect Examination

By Mr. A. L. Maslan:

Q. But it is probable?

A. Anything is probable like that.

(Testimony of Dr. Carl Jensen.)

Mr. Preston: Did you say probable or possible?

The Witness: I will correct it. Anything is possible, would be better, not probable.

Mr. Preston: Not probable but possible.

Q. But as you suggested in your cross-examination, that the best you can get from the natural improvement, if it will naturally improve, is 20-60, is that right?

A. That would be a fair guess at this point. It is impossible, as I use the word guess, to guess what the improvement will be.

Q. It is possible that there may not be an improvement, isn't it? [128]

A. It is possible.

Mr. Preston: That has been gone over again and again. It is repetition.

The Court: Sustained. Avoid repetition.

Q. Doctor, did you submit a bill for your services rendered?

A. No, sir. Oh, I think there has been some bill to the state, yes, sir. I guess the girl has taken care of that.

Q. Do you know what that bill was?

A. No, sir. Just guessing now, for the times I have seen him for the State?

Q. How much was your bill?

A. To the State, to date, I think it was \$39 or something. I don't know.

Q. I believe this is proper, if I might ask this

(Testimony of Dr. Carl Jensen.)

question. What in your estimation would these operations come to in the event——

A. That is impossible to state, because your operations run anywhere from nothing to \$1000, whatever the patient has. That would be difficult to state because one has to consider the situation of the individual being operated.

Q. Have you recently done a corneal transplant?

A. Yes, sir.

Q. Have you submitted a bill for that? [129]

A. That most recently was done for nothing, but that varies, your fee will vary anywhere from, we will say \$500. It depends on the individual, you cannot say what the fee will be.

The Court: You may step down.

(Witness excused.)

The Court: The doctor is excused and may retire when he wishes. Call the next witness. The witness, Radinsky, will resume the stand.

JACK RADINSKY

Direct Examination

(Continued)

By Mr. A. L. Maslan:

Q. You had reached Exhibit 16, I believe. You were testifying in relation to the earnings of Oscar Haynes for the year—you testified that he had earned \$2996 and some cents for the year 1947?

(Testimony of Jack Radinsky.)

A. That's right.

Q. And you had also testified, I believe, that from January 1, 1948, to February 20, 1948, he had earned some \$550 and some cents?

A. That's right.

Q. Did anyone take his job after he became incapacitated? [130]

A. Yes, we hired another man after the accident occurred.

Q. Who was that man?

Mr. Preston: Objected to as immaterial, if the Court please.

The Court: Why is the identity of the man——

Q. Well, did some man take his place?

A. Yes, another man took his place.

Q. What did that job pay for the balance of the year, 1948?

Mr. Preston: That is not material, if the Court please, what somebody else earned. They have shown what this young man earned in the past. What somebody else earned at that job is an entirely different matter, different condition, has no bearing on this.

The Court: Establish similarity of conditions.

Mr. A. L. Maslan: I will show the same position, absolutely the same type of work this young man was doing.

The Court: Lay the foundation.

Q. Did someone take the job that he was working at? A. Yes, someone did.

(Testimony of Jack Radinsky.)

Q. Did this successor of Oscar Haynes do exactly the same type of work which he would have done?      A. Yes, the same type. [131]

Q. What work did he do?

A. Truck driving.

Q. Was that the same job Oscar had?

A. On the same truck, yes.

Q. If Oscar had been there, would he have done the same work? Would you have used him instead of his successor?

Mr. Preston: That is objected to as leading and suggestive.

The Court: I will overrule this, but I think you could get at it by one question; if he had remained on the job, how much would he have earned?

Q. If Oscar had remained on the job for the balance of the year 1948, how much would he have earned in addition to the \$550 that he did earn?

A. He would have earned at least \$3500 more.

Q. How much would he have earned during the year 1949 to date?

Mr. Preston: That is too remote.

Q. If he had continued the job?

Mr. A. L. Maslan: May it please your Honor, I do not think that is too remote.

The Court: The objection is overruled, in view of the last addition to the question.

The Witness: The year 1949, this year just coming [132] to a close?

Q. Yes.      A. He would have made \$4500.

(Testimony of Jack Radinsky.)

Q. Were you at all times satisfied with Oscar's services prior to his injury?

A. Yes, we were.

Q. Was there a probability that you would have kept him on?      A. A great probability.

Mr. A. L. Maslan: Take the witness.

Cross-Examination

By Mr. Preston:

Q. For the purpose of testifying later, would you bring the records that you were subpoenaed to bring?      A. Yes, I have them.

Q. Will you remain in attendance until this other matter, until you are called on this?

The Court: Do not absent yourself from the trial while the trial is in progress without the Court's further consent. You may step down.

(Witness excused.)

Mr. A. L. Maslan: These exhibits were marked for identification, may it please Your Honor. I am offering them in evidence. [133]

The Court: Exhibits 16, 17 and 18?

Mr. A. L. Maslan: Yes, Your Honor, to show the earnings.

The Court: Each of them is now admitted.

(Plaintiff's Exhibits 16, 17 and 18 received in evidence.)

Mr. A. L. Maslan: We will call Mr. Cliffe as an adverse witness.



EDWIN CLIFFE

called as an adverse witness by the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. A. L. Maslan:

The Court: State your name for the record?

The Witness: Edwin Cliffe.

Q. Where do you live?

A. At 3908 North 25th Street, Tacoma, Washington.

Q. What is your occupation?

A. I am assistant superintendent of the Tacoma Plant of the Pennsylvania Salt Manufacturing Company.

Q. I beg your pardon? [134]

A. Assistant superintendent of the Tacoma plant.

Q. Of the Pennsylvania Salt Manufacturing Company?

A. Of the Pennsylvania Salt Manufacturing Company of Washington.

Q. Are there any other Pennsylvania Salt Manufacturing companies?

A. There is a parent company.

Q. Where is that located?

A. In Philadelphia.

Q. Is that a foreign corporation? Is your company a Washington corporation?

A. Our company is a wholly owned subsidiary.

(Testimony of Edwin Cliffe.)

Q. Of what state is that, do you know?

A. I believe it is a Delaware corporation.

Q. How many plants does your company have?

A. The Penn. Salt of Washington has three.

Q. In the state of Washington?

A. One in the state of Washington.

Q. Where are the others?

A. One in Oregon, one in Texas.

Q. What are your duties with the Pennsylvania Salt Manufacturing Company?

A. I am in charge of production and of personnel in the Tacoma plant.

Q. What do you manufacture in your plant?

A. It is alkalies and chlorine, basic industrial chemicals.

Q. As assistant superintendent of the Pennsylvania Salt Manufacturing Company, do you have occasion to buy and sell the various pipes that you use in your manufacturing plant?

A. I have occasion to dispose of scrapping, if that is what you have reference to. I do not directly purchase the material.

Q. Where is that purchased?

A. It is purchased through our purchasing department.

Q. That is also in Tacoma?

A. That is also in Tacoma.

Q. But as assistant superintendent, you have the duties of disposing of scrap material, is that right?

A. That is correct.

(Testimony of Edwin Cliffe.)

Q. When do you classify the pipe in your firm as scrap material?

A. In period of time do you mean?

Q. Yes, is that considered, as far as time of usage?

A. Ordinarily, the scrap accumulates over a period of time. There is no set time limit, and it is disposed of when it reaches an accumulation we would like to dispose of.

Q. What do you do with your used pipe and scrap iron? Do you place it in any particular—

A. We store it in two locations in the plant yard.

Q. When you have a sufficient quantity, you call for bids or you sell it outright, is that how you dispose of it?

Mr. Preston: Are you speaking of the present time? I am not clear from your question.

Mr. A. L. Maslan: I am speaking of the course of conduct.

Mr. Preston: I think the question should be made clear as to time.

The Court: Try to state the time as to which you are inquiring.

Q. During the early part of 1948, did you have charge of the disposal of the used pipe, scrap iron in your yard?

A. That is correct, I did at that time.

Q. Do you remember the sale of any of this used pipe or material to the Frank Powser Com-

(Testimony of Edwin Cliffe.)

pany during the early part of January or February?

A. I do remember disposing of some at that time.

Q. Would you look at Exhibits 1, 2, 3 and 4 and 7, 8, 9 and 10? Do you recognize that pipe?

A. I recognize these exhibits.

Q. What do they portray to you?

A. This is what we would call a pipe coil, double pipe heat exchanger, properly named.

Q. And that came from your plant? [137]

A. The coil depicted here? I think so.

Q. Would you describe that pipe and how it is made? What type of pipe does it consist of? What is the material that goes into it?

A. These are as I mentioned what is known as a double pipe heat exchanger. It is a large pipe through which a smaller one is inserted, one without the other, and they are welded at the ends. The inner pipe then carries one fluid and the outer pipe carries a second fluid, usually in counter-current flow. There is a heat transfer between the fluids. One may be hot and the other cold, or vice versa, and the two fluids are separated by the pipe walls.

The Court: What is the objective to be gained by these two different temperature fluids?

The Witness: It is a heat exchanger to transfer heat from one fluid to the other fluid.

The Court: For what purpose?

(Testimony of Edwin Cliffe.)

The Witness: These coils are a common item of manufacture. They appear in the company catalog, among other places. They are sold for the purpose of condensing carbon dioxide, is one illustration in plants. We use them in our plant, have used them in the past for cooling our alkalies and for cooling sulphuric acid and for cooling carbon dioxide.

Q. Ordinarily, what chemical runs through the outer [138] layer in your plant? What chemical do you run through that outer layer of pipe?

A. Ordinarily, the small annular space between the two pipes carries the matter you are cooling, and the inner pipe carries the cooling water. In our instance, it is sea water, and as I mentioned we use this same type of coil, have used them in the past for carbon dioxide condenser, for an alkali cooler and sulphuric acid cooler, any one of the three.

Q. Where would the sulphuric acid run? Would that run through the inner space?

A. It would be through the outer space, the small space between the two pipes.

Q. What is known as the jacket, the outer part?

A. That's right, it would be inside the outer jacket and outside the inner jacket.

Q. During the early part of 1948, you stated that you had occasion to sell some pipe and scrap iron to the Frank Powser Company?

A. That is correct.

(Testimony of Edwin Cliffe.)

Q. Do you recognize that coil of pipe as being part of the scrap that you sold at that time?

A. I believe it is.

Q. Who originally discarded that before the sale? Was it under your supervision or through some other member [139] of the plant?

A. This pipe was in the scrap yard when I returned from the Army and I did not place it in the storage yard.

Q. It was there when you returned?

A. It was there when I returned.

Q. Did you ever have occasion to install that type of pipe in your plant, or any other pipe?

A. I personally did not install, but I supervised the installation of similar coils.

Q. And that pipe comes to you new, does it not?

A. We purchase the coil or fabricate it at our own shops of new material.

Q. That is clean, is it not, when it comes to you?

A. Yes, it is clean.

Q. Did you prior to the sale of this pipe inspect it as to whether it contained any caustic or whether there was any sulphuric acid remaining in it?

A. I did not.

Q. To your knowledge, did anyone do that?

A. To my knowledge, no one did.

Q. When you discard pipe of this nature, do you ordinarily flush the pipe to see that it contains no acid or other caustic?

A. When the pipe is removed from service, it is



(Testimony of Edwin Cliffe.)

customary always to flush whatever chemicals may have been [140] in it.

Q. You say you do not know whether that was done in this case?

A. At the time of removal or at the time of sale?

Q. At any time?

A. I presumed it had been done when it was removed.

Q. But you do not know whether that was done or not?

A. I wasn't there at the plant at the time it was removed.

Q. You did not order it done as far as this pipe is concerned?      A. That's right.

Q. And you sold it to Powser?

A. I designated it as one piece of equipment that he was offered to buy. I didn't personally sell it but I designated what he should take.

Q. You told him to take this coil of pipe as part of the scrap that he purchased from the firm?

A. That is correct.

Q. Prior to the time that the pipe had been placed in the scrap heap, had it been a part of your manufacturing system?

Mr. Preston: Just a minute, that assumes something not in evidence, that this was placed in the scrap heap after it was removed from the direct service. [141]

(Testimony of Edwin Cliffe.)

The Court: I believe the scrap yard is where it was put, was it not?

Mr. A. L. Maslan: He stated it was there.

Mr. Preston: In the yard or in the scrap heap?

The Court: I understand there has been some testimony which placed it in the scrap yard.

Mr. Preston: Placed it in the yard, I believe the witness said. My recollection of the testimony is that this was placed in the yard.

The Court: I was saying the same thing, or trying to.

Mr. Preston: I thought Your Honor said scrap yard.

The Court: The yard that was used for storing scrap iron, isn't that what was meant? Mr. Powser, I think, used the expression "left it on the edge of the yard."

Mr. Preston: That was Mr. Powser's yard, Your Honor.

The Court: That is true.

Mr. A. L. Maslan: I think I can straighten it out.

The Court: Proceed.

Q. You have a scrap yard, don't you?

A. We have no place we could designate as the scrap [142] yard, no.

Q. You have a rather large yard, don't you?

A. Our plant covers quite a considerable area, that is true.

Q. You have a spot where you have your ac-

(Testimony of Edwin Cliffe.)

cumulated scrap iron and scrap pipe, isn't that right?

A. Perhaps I can clear this up, if Your Honor please?

The Court: I think it is better to answer the question itself. You might say something one party or the other might object to.

The Witness: We do not have a scrap yard in that term.

Q. Where do you keep your scrap iron and scrap pipe?

A. There are two locations within the plant where we accumulate all iron that may be reused in the plant or may be disposed of as scrap.

Q. In other words, you have scrap heaps? We won't call it a scrap yard but it is a scrap heap, isn't that right?

A. We call it salvage. We attempt to salvage what we can.

Q. Then it is your salvage yard, is that right?

A. I think that is a more proper term.

Q. And you sold this pipe out of your salvage yard?

A. Correct. I designated certain [143] portions of it that would be carried away as scrap. The remainder would be retained as salvage.

Q. When this was discarded, it was scrap, is that right?

A. That is correct.

Q. And to your knowledge it had been discarded, is that right?

(Testimony of Edwin Cliffe.)

Mr. Preston: At what time, please?

Q. At the time of the sale.

A. That was the first disposition of it as scrap.

Q. However, then it was in the early part of February or the latter part of January, at that time you had discarded this coil of pipe as scrap pipe?

A. The day I designated it for sale to Mr. Powser, it became scrap.

Q. What was it before that time?

A. It still was in our yard as a piece of equipment we might find use for.

Q. As possible salvage?

A. As possible salvage.

Q. As soon as the sale was made, you had abandoned the use of it and it became scrap?

A. That is the day I made the decision it was no longer useful, or would probably not be useful and designated it as scrap. [144]

Q. Do you have any idea what this particular type was used for?

A. I wasn't familiar with its particular application. It is of that type, we used them for three different purposes. It may have been any one of the three.

Q. You personally did not know whether it contained any acid or caustic material?

A. I did not personally know whether it contained anything.

(Testimony of Edwin Cliffe.)

Q. You did not warn Mr. Powser in relation thereto, did you?

A. I did not warn anyone that it might contain any chemicals. It was our usual practice to flush them out.

Q. You assumed that it had been flushed?

A. I assumed that it had been flushed.

Mr. A. L. Maslan: That is all.

### Cross-Examination

By Mr. Preston:

Q. Do you know how long it had been since this particular pipe that we have been talking about, this coil, had been in use in the plant?

A. From its first installation.

Q. No, how long since it had been out of use, I will put it that way? [145]

A. It would be hearsay, I have no knowledge of when it was removed.

Q. Let me ask you this, when did you come back from the service?

A. I returned in December, 1945.

Q. Were you returning then to the plant or had you been with the plant previously?

A. I had been with the Penn. Salt Company previous to the war.

Q. You returned in what year?

A. December, 1945, and served in the Portland plant. I didn't return to the Tacoma plant until the latter part of 1946.

(Testimony of Edwin Cliffe.)

Q. Were there some materials, including this pipe, that were kept for possible replacements of your system?

A. That is the reason for our salvage yard. We retain all the equipment that may have a further use within the plant.

Q. Would that further use be to take the place of a similar piece that might be defective?

A. That is correct.

Q. Is that because of the scarcity of materials during the war years and the years following the war years?

A. That is what I was told was the reason for retaining this particular coil, that it was a spare the [146] plant operators intend to use if it became necessary.

Mr. Preston: That is all.

### Redirect Examination

By Mr. A. L. Maslan:

Q. As a matter of fact, it was an obsolete type of pipe, was it not?

A. It is an older type. We have none like it still in service.

Q. You don't use any more like it?

A. Not of this particular manufacture.

Q. Then what could it replace?

A. The identical type we now have in service, they are interchangeable.

Q. Even though it is obsolete or an older type,



(Testimony of Edwin Cliffe.)

you still could use it, is that correct?

A. That is correct.

Mr. A. L. Maslan: That is all.

Mr. Preston: That is all.

The Court: You may be excused.

(Witness excused.)

The Court: We will take a short recess of about ten minutes.

(Recess.)

The Court: All are present as before the recess.

Mr. A. L. Maslan: There are a few questions I failed to ask Mr. Cliffe. May I recall him please?

The Court: You may. Mr. Cliffe is recalled under the same circumstances he was originally called. Resume the stand for further examination.

### EDWIN CLIFFE

recalled as an adverse witness by the plaintiff, having been previously duly sworn, was examined and testified as follows:

### Redirect Examination

By Mr. A. L. Maslan:

Q. Mr. Cliffe, you are a chemist, are you not?

A. No, sir. I am a mechanical engineer.

Q. Are you aware of the properties of sulphuric acid?

A. I am.

(Testimony of Edwin Cliffe.)

Q. You have dealt with acid for quite a while, have you?

A. Since my employment with Pennsylvania Salt Company.

Q. What is the concentration of sulphuric acid that you use in this cooling system, and particularly in this type of pipe? What is the strength of it?

A. The acid in service is what is known as 80 per cent [148] sulphuric acid.

Q. Is that considered quite strong from an acid standpoint?

A. That is quite strong from an acid standpoint.

Q. Is it corrosive?

A. Above 80 per cent, strangely enough, it is not very corrosive to metals. That is why we can use it.

Q. How about human beings, is it corrosive to flesh?

A. It is corrosive to flesh.

The Court: What percentage?

The Witness: 80 per cent, sir.

Q. Would you say it is a highly dangerous object to handle?

A. I believe it is so classified in the Interstate Commerce regulations in its handling.

Q. Could you estimate the Ph density of this sulphuric acid?

A. It is clear beyond the Ph range as we know it in, say, high school chemistry.

Q. I beg your pardon?

(Testimony of Edwin Cliffe.)

A. It is beyond the range of the Ph scale in chemistry.

Q. Would you explain what you mean by the PH range?

A. The Ph range, as I recall it from the study of chemistry, is used for classifying whether an object is an [149] acid or an alkali. A Ph of 6 separates the acids from the alkalies.

Q. Wouldn't it be 7 rather than 6?

A. I believe 6 is the dividing point. 7 gets into the——

Q. Isn't 1 to 7 the acid and 8 to 14 is alkali?

A. I believe that is correct.

Q. As it goes down, it is stronger acid?

A. Correct.

Q. In other words, Ph2 means it is a very strong acid; Ph1 is 100 per cent acid, is it not, in strength?

A. I am not sure on that point.

Q. As you get higher, up to 6, it is a very mild form of acid?

A. That is correct.

The Court: How do you describe the strength of this acid which flowed through these pipes, which was in these pipes, as to strength?

The Witness: I would describe it as 80 per cent sulphuric acid. We would not use the Ph range at all.

Q. And you would say that it is highly dangerous?

A. That is a very corrosive acid.

The Court: 80 per cent sulphuric is very corrosive?

(Testimony of Edwin Cliffe.)

The Witness: Yes, sir. [150]

Q. You say it isn't corrosive to metals, this acid of this strength?

A. It is a very small degree at that strength and above it.

Q. What causes these pipes to wear out?

A. It is normal wear and tear. The inner pipe carries salt water, which is slightly corrosive. Both pipes deteriorate over a period of time, a period of years.

Q. Is there a reaction between the sulphuric acid and the metal of the pipe?

A. A slight reaction.

Q. What happens when this reaction takes place, chemically speaking.

A. In service, you are speaking now, as 80 per cent sulphuric?

Q. Yes.

A. It would remove a small portion of the iron of the pipe.

Q. Well, assuming that due to a heavy blow on pipe containing this sulphuric acid—what would cause that sulphuric acid, the chemical, to spew forth with such terrific force?

A. It would be necessary for a pressure to exist within the pipe.

Q. How does that pressure form, do you know?

A. Are we now also speaking of a pipe in service?

Q. Yes.

(Testimony of Edwin Cliffe.)

A. In our plant, we pump the sulphuric acid through there under pressure.

Q. Does oxygen form in there?

A. Not in service at the 80 per cent strength.

The Court: Do you know what substance was in this pipe that broke on the occasion of this accident when the plaintiff was injured?

The Witness: My conjecture is that the substance they describe as a gray mud was ferrous sulphate, which is a combination of sulphuric acid and iron. Ferrous for iron, sulphate for the sulphuric acid.

The Court: Is there anything about its nature which would cause it to spew itself out, the words have previously been used in the case, through the broken parts of pipe?

The Witness: There is a reaction between an acid that will attack iron and the iron which generates a gas; hydrogen, if confined, would generate pressure.

The Court: State what you know with respect to what was the situation here, what actually occurred here?

The Witness: My conjecture would be that that pipe contains some acid which combined with iron to [152] form ferrous sulphate, and in that reaction form hydrogen, causing a pressure, but how it was confined I am not prepared to say.

Q. What acid would combine with the iron to form the ferrous sulphate?

A. Sulphuric acid.

(Testimony of Edwin Cliffe.)

Q. That would be sulphuric acid plus the iron which would make ferrous sulphate and release hydrogen, and the small aperture or opening having been made, the hydrogen would shoot that ferrous sulphate out? A. That is correct.

Q. And that ferrous sulphate is a caustic agent, it is corrosive, is it not?

A. It is an acid corrosive agent.

Q. To your knowledge, had there been an accident of this nature shortly prior to the time Oscar Haynes was injured, that is, an accident of similar nature?

Mr. Preston: That is objected to as immaterial, if the Court please.

The Court: Read the question.

(Last question read by reporter.)

Mr. A. L. Maslan: I should amend that by saying another accident of similar nature.

Mr. Preston: I object to it as entirely immaterial, Your Honor. [153]

The Court: It seems to me that would show the circumstance as being identical or very similar.

Mr. A. L. Maslan: Similar circumstances, I wanted to get that word in.

Mr. Preston: It is still too general, if the Court please.

The Court: That brings in the law originally announced in the old case of *D. C. vs. Arms*, does it not, and the cases that follow that? For the present, the objection is sustained with leave for



(Testimony of Edwin Cliffe.)

counsel during tonight's session that we will have after the jury is excused to show me I am wrong. If so, we will call the witness back for further examination.

Q. At the time that you sold the pipe to Frank Powser, you were at that time aware of the dangerous propensities of sulphuric acid, were you not?

A. That is correct.

Mr. A. L. Maslan: That is all.

Mr. Preston: That is all.

The Court: You may step down.

(Witness excused.)

The Court: Call the next witness. [154]

### WILLIAM A. KUNIGK

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. A. L. Maslan:

Q. What is your full name, please?

A. William A. Kunigk.

Q. What is your address?

A. Tacoma Yacht Club, Tacoma, Washington.

Q. What is your occupation, please?

A. Assistant division purchasing agent.

The Court: Where?

The Witness: The Pennsylvania Salt Manufacturing Company, Tacoma.

(Testimony of William A. Kunigk.)

The Court: Assistant what?

The Witness: Assistant division purchasing agent.

Q. As such assistant purchasing agent, did you have anything to do with the sale of the pipe of which you have heard us speak today?

A. Yes, I did, I wanted to see as to getting prices on scrap.

Q. In other words, did you send out for bids?

A. That is correct. [155]

Q. For the purchase of this material?

A. That is correct.

Q. Do you recall suggesting bids for the purchase of this scrap in which this pipe was included?

A. As I recall, I asked for bids on scrap iron which included some pipe and scrap steel.

Q. Did that also include the pipe in question? Will you please look at Exhibits 1, 2, 3 and 4 and 7, 8, 9 and 10?

A. That I couldn't say that that was included, because I never did see the scrap myself.

Q. Where was the scrap, to your knowledge?

A. It was within the confines of our yard.

Q. All the scrap is segregated in one section, is it?

A. There are several places where they bring the salvage material together, and at times that are designated, ask me to get prices on scrap and then they haul away those portions which they no longer feel are usable.

(Testimony of William A. Kunigk.)

Q. Did you have occasion to sell this particular scrap in the early part of February, 1948?

A. Yes, I did.

Q. Who did you sell it to?

A. To Mr. Powser.

Q. Did you sell that material as scrap iron?

A. I did, yes.

Q. Do you have the weight tares and the sales slips? [156]

A. I do not, I believe Mr. Driskell has them with him.

Q. Do you know how long that pipe was in the scrap pile before it was sold? A. No, sir.

Mr. Preston: I object, if the Court please, it assumes that this pipe was——

Mr. A. L. Maslan: I withdraw that.

Q. You stated you were not sure whether that pipe was in that pile or not?

A. No, sir, I don't know.

Q. But it was through your particular agency that pipe was sold to Frank Powser?

A. All I knew, it was scrap steel and pipe.

Q. And it was Mr. Cliffe who actually designated the pipe and the scrap iron to Powser's assistants? A. That's right.

Mr. A. L. Maslan: That is all.

Mr. Preston: That is all.

The Court: You may step down.

(Witness excused.)

The Court: Call the next witness. [157]

J. M. DRISKELL

called as a witness by and on behalf of plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. A. L. Maslan:

Q. Your name is J. M. Driskell?

A. That's right.

Q. Where do you live?

A. Horse Head Bay.

Q. Is that in Tacoma?

A. No, that is across the Narrows.

Q. What is your occupation?

A. I am the treasurer of the Pennsylvania Salt Company of Washington.

Q. You have been asked to bring the various sales slips in relation to the sale of iron and scrap to the Frank Powser Company?      A. Yes, sir.

Q. Would you produce them, please?

A. I presume, counsel, it is the one on February 24th you are talking about?

Q. Yes. [158]

A. There were other sales to the Powser Company.

Q. You state you have a sales slip showing the sale of various iron and scrap to Powser dated February 24, 1948?

A. I believe that was the date.

(Testimony of J. M. Driskell.)

Q. What was your usual custom in relation to these sales slips? For instance, if there was a sales slip dated February 24th, would that mean that the iron and scrap was delivered on February 24th?

A. Not necessarily. There might be an accumulation of several loads, depending on how long it took the dealer to pick up the material and for the slips to come into the office.

Q. As I understand, it was your custom to get the weight tares, the weight slips and then accumulate them as soon as the whole transaction was completed, then issuing a sales slip for them?

A. That is correct.

Q. Did you do that in this case?

A. I believe so.

The Court: Before referring to the instrument, let it be marked.

(Weight slips marked Plaintiff's Exhibit 19 for identification.)

Q. Would you read off those weight slips and would [159] you identify them, please?

The Court: Do you offer those in evidence?

Mr. A. L. Maslan: I offer this in evidence, Your Honor.

The Court: It is now admitted.

(Plaintiff's Exhibit 19 received in evidence.)

Q. Would you identify that, please?

A. The weight slips attached to the—the exhibit

(Testimony of J. M. Driskell.)

consists of our invoice to the Powser Company and also a shipping memorandum to the Frank Powser Company. Attached to the shipping memorandum is a square ticket.

Q. Would you make known to the jury the dates on these, please?

A. I will, I am just getting around to the description of it.

Q. Go ahead.

A. A weight slip from the Aaberg Fuel Company, dated February 12th, 5,190 pounds. There was another dated February 12th from the Aaberg Fuel Company, the net of 6,690 pounds. There was another one February 13th from the Aaberg Fuel Company in the amount of 5,070 pounds. There was a second load on the 13th from the Aaberg Fuel Company with a total weight of 6,230 pounds, and there was one from [160] the City Scales dated February 18th for 4,875 pounds.

The Court: If the doctor is here, I would like to accommodate him. The witness is temporarily withdrawn from the witness stand. The doctor will come forward and be sworn.



DR. JESS W. READ

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. A. L. Maslan:

Q. What is your name, please?

A. Jess W. Read.

Q. What is your business or occupation?

A. I am a physician and surgeon.

Q. Where do you practice your profession?

A. In Tacoma, Washington.

Q. Where do you live?

A. I live at Tacoma.

Q. What is the address?

A. 800 North C Street.

Q. What is your office address? [161]

A. 1125 Russ Building.

Q. Tacoma, Washington?

A. Tacoma, Washington.

Q. What is your specialty, Doctor?

A. I am a surgeon. I do quite a bit of hand work and I do some plastic work.

Q. How long have you been a practicing physician and surgeon? A. Since 1933.

Q. What school did you graduate from?

A. From Stanford.

The Court: What do you mean, you do some hand work?

(Testimony of Dr. Jess W. Read.)

The Witness: I pay special attention to lacerations and injuries of the hand, the tendon work, the nerve work, skin, things of the hand.

The Court: Was there something else you said your specialty included other than surgery and hand work? If so, will you restate it?

The Witness: No, except surgery includes some plastic work.

Q. Did you state that you specialize also in plastic work?

A. Insofar as my specialty of surgery includes that, yes. [162]

Q. How long have you been specializing in surgery? A. For the last several years.

Q. Did you have occasion to attend the medical needs of Oscar Haynes on or about the 20th day of February, 1948? A. Yes, I did.

Q. How did you happen to be called to take care of the patient?

A. I was called from the Tacoma General Hospital to see him.

Q. Were you in your office at the time you were called? A. Yes.

Q. Approximately what time were you called?

A. It was shortly after noon, shortly after 12:00 o'clock.

Q. Did you leave your office?

A. Yes, I went up to see him.

Q. Did you then see Oscar Haynes?

A. Yes.

(Testimony of Dr. Jess W. Read.)

Q. What did you find as far as his physical condition was concerned?

A. His face was covered with a plaster of baking soda. His forehead, his nose, his checks, the corners of his mouth, his chin, under his chin had been burned by some caustic. His eyes were swollen and watering. There was [163] sort of a film over the clear part of the eye. He was having considerable pain from these burns. That was the main feature for which I was called to take care of him.

Q. What did you do for his burns?

A. His burns were washed with a boric acid solution. Then they were covered with baking soda, then they were washed again with a salt solution, then the burns were covered with a vaseline gauze dressing. That was the local treatment of the burns at that time.

Q. Was he in pain at the time you first saw him?

A. Yes.

Q. You had seen him within the first hour, had you not?

A. Within the first several hours from the time he was burned, yes.

Q. Would you refer to the medical charts of the hospital, please, Exhibits 12 and 13? See if you can refresh your recollection as to what you did for Oscar?

A. According to the notes I made at the time I saw him first, I suggested we irrigate his face with a phosphate solution. That was a solution that will

(Testimony of Dr. Jess W. Read.)

neutralize either an acid or an alkaline substance, and by its volume will help wash it away and counteract it. That solution wasn't available at the time, so a salt solution was used to irrigate his face and wash off the soda bicarb solution. [164]

Then as I described, after the baking soda which was put on at first was washed off, the burns were covered with vaseline, gauze and dressings and then a piece of stockinette, like underwear material, the proper size, was put over his head as a mask, and holes cut for his nose, eyes and mouth. This was to hold his dressing in place.

Then he was given penicillin and fluids were pushed by mouth. He was given diet as he could take it, and he was given codeine or morphine as necessary for pain, and at that time I made the note that I was unable to determine the depth of the burn. One may treat a burn as a wound, and perhaps, if it is small enough, or the depth can be accurately determined, to cut out that burn and graft it immediately. In this burn we were not positive of the caustic that produced the burn and it was impossible to tell from the appearance how deep that burn was and how much tissue would have to be excised, cut out, in order to make a graft, so that that type—the other reason, the burn was quite extensive in spotted areas, and it would have been quite an undertaking to try to graft the burn primarily, so it was decided to treat it in the usual manner by protecting the burned wounds, allow the

(Testimony of Dr. Jess W. Read.)

burned tissue to soften and be discharged and then allow the tissues underneath to heal and the skin to heal over from the sides. This subsequently took place and it was never necessary to apply [165] skin to close the wounds. They healed in small areas rapidly enough so that it wasn't necessary to do a skin grafting.

Q. How long was he in the hospital?

A. Until April the 17th. He was discharged 4-18-48, 58 days in the hospital.

Q. Did you remain in attendance on him during all that period of time?      A. Yes.

Q. Did you have occasion to treat his eyes also in conjunction with Dr. Cameron?

A. I saw his eyes several times with Dr. Cameron, but it was Dr. Cameron's responsibility to treat the burn of his eyes.

Q. Have you given thought to a skin graft eventually?

A. Yes, sir, I have. During the time he was in the hospital, the question had been decided whether it would be wise to skin graft those burned areas at that time or to allow them to heal and then decide if skin grafts might be necessary to replace scar tissue. I recently considered the problem and felt the appearance is the principal factor, although there are several scars at the inner corners of each eye and one at the corner of his nose, that bridges the crease at the end of the nose, and a scar at the corner of the lip that deflects the

(Testimony of Dr. Jess W. Read.)

curve of the lip slightly, and [166] a scar on the chin. If all of those various scars were piece-meal grafted, the grafts would be foreign to the texture of the skin of his face. If the whole face was grafted, it would be too major a procedure to consider for what could be gained.

Q. What would you say the recovery has been? You have examined him recently?

A. I would say that——

Q. As to his burns?

A. He has made a good recovery except for these burns. The scars, because there are several on his forehead, change his appearance. The two little scars on the inner side of each eye pull his eyelid down when he uses his eyebrows for expression. There is a scar across the crease at the side of his nose on the right that changes his appearance somewhat, and the outer tip of his lip is pulled up by another scar. Then on his chin, the skin is somewhat lumpy from scarring.

Q. Do you ascribe any reason for the face to exude at the present time, that is, erupt with various matter and so on?

A. The skin has healed a burn. The scar tissue is thin and is vulnerable to any irritation, rubbing or wind, for instance. It will very easily form tiny ulcers that will weep serum. They will heal again but that skin over a scar is not as durable as normal skin, and can very easily [167] form tiny ulcers from time to time. It is more sensitive than normal



(Testimony of Dr. Jess W. Read.)

skin. It isn't as hardy, not as protective as normal skin.

Q. Are those ulcers painful when they exude?

A. They may be if they become inflamed.

Q. Is this type of injury liable to pain in the future, that is, if there are exudations?

A. With an ulceration and inflammation in a scar, it would be temporarily painful.

Q. How long do you think these exudations might continue from your experience with burns of this nature?

A. The skin is permanently changed and at any time in the future they can form these tiny ulcerations.

Q. You treated him, you stated, during all these 58 days in the hospital. How long did the suffering and the pain continue, if you remember?

A. He still was—his misery, his pain and suffering decreased as the burns healed. At the time he left the hospital there were still some areas not completely healed and he still had some discomfort from them. His amount of pain at that time, at the end of 58 days, I don't believe would be described as suffering. He was miserable from it, though.

Q. Did you render a statement for your services?

A. I rendered a statement to the Department of Labor [168] and Industries, yes.

Q. Have you been paid? A. No.

(Testimony of Dr. Jess W. Read.)

Q. What was the value of your services? What was the statement, the amount of the statement?

A. That I don't remember exactly.

Q. We have here a statement for \$113. Is that a reasonable fee for your services?

The Court: Let it be marked.

(Bill marked Plaintiff's Exhibit 20 for identification.)

The Witness: Yes, that is on the basis of the Department of Labor and Industries fee schedule, and that would be reasonable for 58 days' care in the hospital.

The Court: What amount would you say would be a reasonable charge for your services at that time?

The Witness: \$113.

(Hospital statement marked Plaintiff's Exhibit 21 for identification.)

Mr. Ben Maslan: I think counsel agrees that is a reasonable statement from the hospital and may be [169] admitted, that is my understanding.

Mr. Preston: That is correct.

The Court: Do you offer Plaintiff's Exhibit 20?

Mr. A. L. Maslan: Yes, Your Honor. That is the hospital bill.

The Court: Ask the witness what it is.

Q. What is that, Doctor? A. \$580.

The Court: What does it concern, or state?

(Testimony of Dr. Jess W. Read.)

The Witness: It is a statement from the Tacoma General Hospital for Mr. Oscar Haynes.

The Court: The Tacoma Hospital bill, is that what it is?

The Witness: Yes, sir.

Q. For what period of time is that?

A. February 21st through April 18th, 1948.

Q. How much does that show?

A. \$580.42.

Q. Would you say that is a reasonable bill for the amount of services that have been rendered?

A. Yes.

The Court: Do you offer Plaintiff's Exhibit 21?

Mr. A. L. Maslan: Yes, Your Honor.

The Court: It is admitted. [170]

(Plaintiff's Exhibit 21 received in evidence.)

Mr. A. L. Maslan: You may take the witness, counsel.

Mr. Preston: I have no questions.

Mr. A. L. Maslan: Pardon me, one question.

Q. After examining Oscar, could you prognosticate as to how his face would look a year or two from now, or would you say his face will appear the same?

The Court: Has the plaintiff been presented to you for such an examination lately? If not, he may be presented now. Just look at him, have the question read and answer the question. Read the question.

(Testimony of Dr. Jess W. Read.)

(Last question read by reporter.)

The Witness: I would say the face would appear practically the same as it does now in a year or two. The color of the areas on his forehead will probably fade, but they will become whiter and it will be just as noticeable.

Q. Do you then consider these facial injuries as permanent?           A. Yes.

Mr. A. L. Maslan: Take the witness.

Mr. Preston: No questions.

The Court: The doctor may be permanently excused. [171]

(Witness excused.)

The Court: Remember the Court's previous admonitions against discussing this case with anyone, and concerning the conditions under which you may receive information, and do not receive information in any other way. Be sure to remember and heed the Court's admonitions. I think we should be able to begin by 9:30 tomorrow morning and the jurors are excused until that time and may now retire. Counsel and I have some work to do this evening.

Court will be at recess until 8:30 this evening.

(At 7:00 o'clock p.m., Tuesday, November 22, 1949, proceedings recessed until 8:30 o'clock p.m., Tuesday, November 22, 1949.)

Seattle, Washington, November 22, 1949,  
8:30 o'Clock, P.M.

(Argument had by respective counsel on behalf of plaintiff and defendant.) [172]

The Court: So far as any evidence up to this time is concerned, there is nothing that justifies the Court in submitting this issue to the jury. The undisputed fact so far is that this accident took place on premises wholly disconnected from the plant and industrial operations of the defendant. Any extra hazardous work which the defendant may have been doing in connection with the defendant's industry had ceased long before this accident happened with respect to the cause of this accident. This pipe which exploded or which produced an explosion when the walls of the pipe were broken by the sledge hammer was wholly disconnected from any present or then existing activities in the defendant's industrial operation. This pipe which produced an explosion when the walls of the pipe were broken had become wholly disconnected from service so far as the operations of the defendant's plant and facilities in the defendant's extra hazardous business were concerned.

Such disconnection from service was just as effective as if the power transmission cable or the electric wire in the Weifenbach case had been severed by pliers two miles from the place where the plaintiff in the Weifenbach case was injured, and had been discarded and entirely thrown away, and after

it had [173] been so discarded the plaintiff had stumbled upon it and thereby had sustained an injury. In such a situation, the wire could not have been reasonably held to have been connected with the City of Seattle's electric distribution system, and in that situation the wire would not have been in service, and as to it the City of Seattle would not have been engaged in extra hazardous employment or operation. And so here, this pipe for an appreciable time before this accident was disconnected from any extra hazardous operations of the defendant in its industry and had been separated from its plant and delivered to the plant of a total stranger so far as the defendant's industry and extra hazardous operations in industry were concerned. And just as in the Gephart case, the defendant was not in the course of any extra hazardous employment at the time of the accident so far as the instrument or thing which caused the accident was concerned.

The plaintiff, therefore, has the right to, as he alleges he has elected to do, seek his remedy by suit against the defendant rather than to take the benefits provided by the Workmen's Compensation Act of the State of Washington, and any defense pleaded by the defendant by which the defendant claims an exemption under the proviso, "that no action may be [174] brought against any employer or any workman under this Act as a third person if at the time of the accident such employer or such workman was in the course of any extra hazardous employment under this Act . . ." does not apply



to the facts so far developed in this case, and does not establish any right in the defendant to plead the defendant's first affirmative cause of action. The proof so far establishes positively the lack of defendant's qualification to assert the defense under this proviso which I have just read.

Has anyone anything further to say with respect to any other practical aspects of pleading or of proof, if any proof is available.

Mr. Starin: In the light of the Court's ruling, we intend to make an offer of proof of the facts which we have alleged for the purpose of the record. We presume that there will be some time available tomorrow for that purpose.

The Court: Do you have the offer of proof?

Mr. Starin: We do not have it in such form at this moment, Your Honor, as we would like to have it.

The Court: The other detail that I had in mind in asking you if there was anything further to be said was this: This ruling does not preclude the right of defendant to offer evidence, if the defendant has any, [175] that this accident took place on the defendant's premises, or any other evidence that would tend to prove that this pipe was not severed from the service of defendant's extra hazardous operations, if there is any such proof of that kind or evidence of that kind available at this time. I take it from the developments so far that it is not likely that there is available to defendant any such evidence as that kind I now mention.

Of course, this Court does not know what the evidence is or is likely to be. Up to now I do not see any promise of any such, but I am speaking with reference to the situation as it now is on the proof which has now come in, and I am certain that up to now you are not entitled to have this issue submitted to the jury on any evidence that has been received up to this time. Unless there is brought out before the jury some evidence which will justify the submission of this issue to the jury, at a proper time the Court would be disposed to rule upon a motion similar to that which is here now before the Court, that the motion should be granted, which would leave the Court after such granting without that issue before the Court and jury and would relieve the Court of any necessity of instructing the jury concerning any such issue as that tendered by the [176] defendant's first affirmative defense.

I indulge that further thinking so as to project ourselves into the future. It seems to me at the present it is not necessary for the Court to rule upon this motion because the case is not finished yet, and as long as the case is not finished, I have no right to say now that there not only is not or will not be any evidence which will entitle the defendant to submit that issue to the jury.

Mr. Preston: Our offer of proof will go, I might say, to these points which we concede are essential and proper, but under Your Honor's ruling I presume the offer would be denied; namely, that the

defendant was at all times concerned since the inception of its plant, the opening of its plant, a contributor to the fund for extra hazardous employment, was not in default thereunder; and secondly, that all employees in the plant of the defendant were at all times since the opening of the plant in 1928 engaged in extra hazardous employment and so classified under the act and premiums paid accordingly. That, I assume, possibly the other counsel will stipulate to be the fact, although we will make an offer of proof. Under Your Honor's present indicated ruling, that would be probably ruled as incompetent. [177]

We are not attempting to show that the injury to the plaintiff happened any other place than has been disclosed in the evidence, nor will we contend that the pipe in question was not in the Frank Powser yard at that time.

The Court: I assume you will not contend that the pipe in question had for an appreciable length of time been disconnected from service in the defendant's extra hazardous industrial operations?

Mr. Preston: The evidence shows and we will concede it to be the fact it was part of the system until it was sold on this day.

The Court: Until it was disconnected and put in the salvage?

Mr. Preston: No, on that, Your Honor, the evidence shows that even after it was disconnected and taken out of the system proper that it was

kept there as a spare until it was decided to be sold on this day.

The Court: But it had not been in use since it was disconnected? It had not been in actual use?

Mr. Preston: Not in physical use, it was standing by as a spare and was part of our system in that respect. That is what the evidence shows up to now and we will not contend otherwise.

In addition to that, Your Honor, our [178] offer will show when it is made that the plaintiff was at all times during the happenings here concerned a workman under the act and classified under the extra hazardous employment. In fact, we will also show that as bearing on that—we would offer to show that he applied for and received compensation under the act as an extra hazardous employee.

The Court: By virtue of the accident?

Mr. Preston: Yes.

Mr. Ben Maslan: He elected to.

The Court: What evidence is there in the record of the last fact stated by Mr. Ben Maslan?

Mr. Ben Maslan: If there is any question about it, we will present affirmative evidence on this, Your Honor.

The Court: I have noted that that has been stated more than once this evening, and I do not recall having brought to my attention during the trial, any evidence of that election, and I believe that there is something in the law touching the necessity of such.

Mr. Ben Maslan: It may very well be that the

mere bringing of suit is election, Your Honor. At the time of counsel's offer, we will present this other matter.

The Court: Is there anything else? [179]

Mr. Starin: At the conclusion of the testimony of Mr. Driskell, the question was asked as to whether or not a similar accident had occurred previously, and the Court reserved ruling.

The Court: The Court sustained the defendant's objection to that inquiry, and I made a statement that unless counsel convinced me this evening that I was wrong, the ruling would stand.

Mr. Ben Maslan: We have discussed it and we are satisfied that we should not press the issue at this time.

The Court: I will excuse counsel until 10:00 o'clock. Court is adjourned until tomorrow morning at 9:30.

(At 10:30 o'clock p.m., Tuesday, November 22, 1949, proceedings recessed until Wednesday, November 23, 1949, at 9:30 o'clock a.m.) [180]

Seattle, Washington, November 23, 1949

10:00 o'Clock, A.M.

The Court: Let the record show that all jurors are present and also all parties on trial with their counsel.

I might explain to the jurors that the proceedings in Court last night were longer than we an-

ticipated and the Court expressly excused counsel and parties until this hour.

Mr. Driskell will resume the stand for further examination.

J. M. DRISKELL

Direct Examination  
(Continued)

By Mr. A. L. Maslan:

Q. Will the reporter please read the last question and answer?

(Last question read by reporter as follows:

“Q. Would you make known to the jury the dates on these, please?

A. I will, I am just getting around to the description of it. [181]

Q. Go ahead.

A. A weight slip from the Aaberg Fuel Company, dated February 12th, 5,190 pounds. There was another dated February 12th from the Aaberg Fuel Company, the net of 6,690 pounds. There was another one February 13th from the Aaberg Fuel Company in the amount of 5,070 pounds. There was a second load on the 13th from the Aaberg Fuel Company with a total weight of 6,230 pounds, and there was one from the City Scales dated February 18th for 4,875 pounds.”)

The Court: With regard to coming in or going out of your industrial plant premises, in what manner were these transactions handled? In what clas-



(Testimony of J. M. Driskell.)

sification were they? Were those transactions concerning materials coming in or going out of your plant facilities?

The Witness: Material going out.

Q. Mr. Driskell, under whose supervision were these loads of scrap iron weighed?

A. I don't quite get what you mean on that.

Q. Where were they weighed, do you know?

A. These various places that I read, Aaberg Fuel Company and City Scales.

Q. Those are public scales, are they?

A. I believe they are.

Q. They are outside of the plant, [182] are they?

A. Yes, sir.

The Court: Whose plant?

Q. Outside of the plant of the Pennsylvania Salt Manufacturing Company?

A. That's right.

Q. Did you point out the scrap and did Mr. Powser then take them and weigh them outside the plant, is that the procedure?

A. I wouldn't know about that, because I don't dispose of it.

Q. I beg your pardon?

A. I wouldn't know about that because I do not dispose of the scrap.

Q. Who delivered those weight slips to you?

A. Actually, they didn't come to me. They came to some of my employees and they probably came through from Mr. Nelson.

(Testimony of J. M. Driskell.)

Q. They came from Mr. Nelson?

A. I believe so.

Q. How did you come to the invoice dated February 24th, that is, how did you come to make that invoice dated February 24th?

A. That would be the date when the slips would all be in, and they would be sure there would be no further slips coming in, so one billing would cover the whole [183] transaction.

Q. Then the bill of February 24th would cover the transaction of all the scrap iron which had been delivered to Mr. Powser, the dates of February 11, 12, 13 and so forth?

A. From the 12th to the 18th.

Mr. A. L. Maslan: That is all.

The Court: You may cross-examine.

Mr. Preston: No questions.

The Court: You may be excused.

(Witness excused.)

PAUL E. NELSON

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. A. L. Maslan:

Q. Your name is Paul E. Nelson?

A. Yes, sir.

Q. Where do you live?

(Testimony of Paul E. Nelson.)

A. 225 South 60th, Tacoma, Washington.

Q. Where are you employed?

A. Pennsylvania Salt Manufacturing Company.

Q. What is your position there?

A. Store keeper.

Q. How long have you been employed as such store keeper at that plant?

A. For about two and a half years.

Q. Were you employed as such store keeper during the month of February, 1948, at the Pennsylvania Salt Manufacturing Company plant in Tacoma?

A. Yes, sir.

Q. What does that position of yours entail, that is, what are your duties as such store keeper?

A. Well, I wouldn't know how to explain that, charge of the storeroom and supplies.

The Court: What kind of work did you do in February, 1948? Describe some of the duties performed by you in that capacity.

The Witness: Inventorying the supplies on hand.

Q. In relation to your duties, do you have charge of the disposal of the scrap iron materials and used pipe belonging to the plant?

A. Yes, sir.

Q. During the month of February did you have charge of such disposal?

A. Yes, sir.

Q. That is, February, 1948. Does that also include [185] used pipe and discarded pipe?

A. Yes, sir.

Q. Do you recall having any transactions in re-

(Testimony of Paul E. Nelson.)

lation to the sale of used scrap and discarded pipe to Mr. Frank Powser?      A. Yes, sir.

Q. What particular duty did you have in relation to such disposal or sale?

A. I would call Mr. Frank Powser and tell him that we had some scrap for sale and he would send his truck down.

Q. Did he do this?      A. Yes, sir.

Q. Did you have anything to do with the allocating or pointing out of the particular scrap iron and pipe to Mr. Powser or his assistants?

A. Yes, sir.

Q. Will you state the circumstances in relation thereto, please?

A. Well, we have a certain spot for scrap iron, pipe, and there is other places in the yard that would be surplus or discarded material.

Q. What happens to the scrap iron or discarded pipe? Do you place it in one or two different spots or locales in your yard? [186]

A. Well, small stuff would be placed in a certain spot and larger discarded material would be placed in another location.

Q. Would you please look at Exhibits 1, 2, 3 and 4 and 7, 8, 9 and 10 of the plaintiff and state to the jury what those exhibits portray?

A. That is a pipe coil that was in our yard.

Q. Do you recall whether you sold that in addition to other scrap to Frank Powser?

A. Well, it looks familiar but I couldn't be

(Testimony of Paul E. Nelson.)

certain if it was or not because at that time I wasn't familiar——

Q. What was customarily done in the sale of scrap iron and scrap pipe?

A. Well, when Mr. Powser would bring in the weight certificate or weight slip, then I would make out the shipping memorandum and turn it over to the main office.

Q. What did you do before you got the weight slip? There were some proceedings before you got the weight slip, were there not?

A. I couldn't do anything until I got the weight slip.

Q. How did you happen to get them? What did Mr. Powser have to do before he could get the weight slips?

A. He would have to take it down to those certified scales to be weighed. [187]

Q. Those are all certified scales? A. Yes.

Q. That would be subsequent to the time that he picked up this scrap, and he picked up the scrap subject to your direction, isn't that so?

A. That's right.

Q. Do you know where that particular type of pipe came from?

A. No, I don't. That was before I went to work there.

Q. Did you ever see that pipe in place in your plant? A. No, I haven't.

Q. When was the first time you saw that pipe?

(Testimony of Paul E. Nelson.)

A. When I saw these pictures.

Q. Is that the first time you remember seeing the pipe?

The Court: I understood from your previous statements that you were doing this kind of work for your employer during the month of February, 1948, and do you now say you were not doing this kind of work at that time?

The Witness: Yes, I was but the pipe—I can't recollect seeing that pipe at the time of disposal.

Q. Do you not state you saw that pipe in the scrap [188] pile?

A. It looks familiar, yes.

Q. If you were advised by the evidence and by Mr. Powser that that pipe was taken from your yard pursuant to your direction, would you state that is true or untrue?

A. I would say it was true.

Mr. Preston: That is not a proper question, if the Court please.

The Court: The objection is sustained. The answer is stricken and the jury will disregard it.

Q. Did you ever see any pipe similar to that in the scrap pile? A. No, I haven't.

Q. Did you have occasion to dispose of pipe of any kind in the scrap pile? A. Well, yes.

Mr. A. L. Maslan: That is all.

The Court: You may cross-examine.



(Testimony of Paul E. Nelson.)

Cross-Examination

By Mr. Preston:

Q. Did you or someone else determine what was to be sold and what was to be retained out of those materials that were not being actually used in the operation of this plant?

A. On this particular subject it was another person. [189]

Q. Who would that be?

A. Mr. Cliffe.

Q. Then I take it that this particular pipe was sold under the direction of Mr. Cliffe rather than yourself?

A. That is right.

Q. You simply were an instrumentality in calling Mr. Powser, whoever you wanted to sell it to, to come over and see it?

A. Yes, sir.

Q. To see what Mr. Cliffe had decided they no longer needed, is that right?

A. Yes, sir.

Q. Is it or is it not true that materials were kept during the war years and afterwards in the yard adjoining the plant of the defendant for possible replacement use?

A. Yes, sir.

Q. If you remember, will you tell the jury whether or not coils similar to the one that is pictured which you have before you were so kept in the yard adjoining the plant of the defendant, if you remember?

A. Well, I don't know of any coil similar to this one being in the yard.

Q. At any place?

A. No.

(Testimony of Paul E. Nelson.)

Q. When did you come to work for the company? [190] A. March 4, 1947.

Q. Where is your office and where do you work from with respect to this particular plant?

A. I work in the storeroom and shop combined.

Q. Is that part in the building of the plant as distinguished from a separate building which houses the office force?

A. Yes, it is inside the plant.

Q. You are actually inside the plant and your duties keep you inside the plant, is that correct?

A. Yes.

Q. And this other building, this office building that I am speaking of, contains the office and stenographic help, is that right?

A. That is right.

Q. A separate building?

A. That is right.

Mr. Preston: That is all.

Mr. A. L. Maslan: That is all.

The Court: You may step down.

(Witness excused.) [191]

### FRANCIS P. OWENS

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. A. L. Maslan:

Q. What is your name, please?

(Testimony of Francis P. Owens.)

A. Francis P. Owens.

Q. Where do you live?

A. In Seattle, Washington.

Q. What is the street address, please?

A. 2729-38th S. W.

Q. What is your occupation?

A. I am a chemist.

Q. What type of chemist?

A. Analytical and consulting chemist.

Q. What?

A. Analytical and consulting chemist.

Q. Where are you employed?

A. I am employed by Laucks Laboratories, Inc.

Q. How long have you been employed there?

A. I have been employed by Laucks since May of 1934.

Q. In what capacity? [192]

A. In varying capacities from sampler to chemist to chief chemist.

Q. Where are you graduated from?

A. I was graduated from the State College of Washington with a degree of Bachelor of Science in chemistry in June of 1933.

Q. And you have furthered your studies since that time?

A. I took some graduate work at the University of Washington in 1940.

Q. Just what does your work entail?

A. Our work entails examining and testing the various commodities and products that are submitted to us by clients who have analytical work to

(Testimony of Francis P. Owens.)

do and do not have the facilities themselves to do it.

Q. Do you recall analyzing a chemical for me some time in August, 1948? A. Yes, sir.

Q. What was it that you analyzed?

A. You submitted several samples to our laboratory, among them being a pint milk bottle containing some liquid, and also some sediment, and several items of clothing including a hat and pants.

Q. Do you have that clothing with you?

A. Yes, sir. [193]

Q. By the way, where did you get that clothing?

A. It was submitted to me personally by you.

Q. Was there anyone else with me at that time?

A. There were two other gentlemen with you, there was a Mr. Albert Hanan and another gentleman, I forget his name at the moment.

Q. Was the man George Haynes?

A. Yes, sir, that was the name.

Q. Do you have that clothing with you that was submitted to you? A. Yes, sir.

Q. Would you produce that, please?

(Clothing marked Plaintiff's Exhibit 22 for identification.)

Mr. A. L. Maslan: That will be connected up later as being the clothing, if there is any question, Your Honor.

Q. Is that clothing safe to handle at the present time?

(Testimony of Francis P. Owens.)

A. Well, there are still some corrosive materials on it. It would be best not to get it on your hands.

The Court: Let counsel on each side see Plaintiff's Exhibit 22 for identification.

Mr. Preston: I can't see anything. It is all covered with paper.

Q. Would you take that out, please? Mr. Owens, did you have occasion to test the contents of the bottle? A. Yes, sir.

Q. What did you find the contents of the bottle to be?

The Court: Is the bottle mentioned by you present among those articles marked as Plaintiff's Exhibit 22?

Mr. A. L. Maslan: Yes, Your Honor.

The Court: I asked the witness.

The Witness: Yes.

Q. Did you have occasion to analyze the contents of that bottle? A. Yes, sir.

Q. What did you find the contents of that bottle to be?

A. I find that it contained approximately 48 per cent by volume of sulphuric acid, and it had a residue in it which consisted essentially of iron sulphate.

Q. Is iron sulphate a salt? A. Yes, sir.

Q. Did you in addition have occasion to analyze any of the chemicals or salts that were taken, if they were, from the clothing that was submitted to you? A. Yes, sir. [195]

(Testimony of Francis P. Owens.)

Q. What did you find to be the chemical composition of that material or salt?

A. Portions of clothing that were disintegrated, as evidenced by looking at them, were removed and put in water and boiled to dissolve any residue that might be in them, and then this water was filtered from the clothing and was tested to determine whether or not there was sulphate present in it, and also to determine the reaction or acidity of the water to give me an idea whether or not the nature of the sulphates could have been of an acid character.

Q. What did you find to be the chemical composition?

A. I found that all of the samples that were tested did contain sulphates and that the reaction was on the acid side by an appreciable amount.

Q. How much would you say they were on the acid side?

A. Well, a quantitative measurement was not made of this, but the water was tested qualitatively with litmus to determine its Ph—and by Ph I mean the acidity of the water. A neutral solution is said to have a Ph of 7, while if it is acid, it drops down to zero, from 7 to zero; and if it is alkaline, the Ph number is from 7 to 14. The water that portions of this clothing were boiled in had a Ph of approximately 2, it could have been less, which would indicate it was high on the acid side. [196]

Q. What acid was it? When you say “on the



(Testimony of Francis P. Owens.)

acid side" what acid do you have reference to?

A. Sulphuric acid. Qualitative tests were also made for other acids such as chlorides and phosphates and none of those were detected, and the main was sulphate, so it was our opinion it was sulphuric acid.

Q. Would a chemical which contains a Ph of 2 indicate a weak or a strong acid solution?

A. It would be on the strongly acid side.

Q. Would that strength of an acid be highly corrosive? A. Yes, sir.

Q. Would you consider it dangerous to human life?

A. Well, I would consider it corrosive to the extent that it could cause burns, could cause flesh burns.

Q. Indicating the clothing which you have examined, does that show acid burns, that is, the clothing?

A. Well, the condition of the clothing is typical of what would happen if you put acid on clothing of that sort.

Q. Did you have occasion in September, 1948, to examine certain pipe in Tacoma, Washington?

A. Yes, sir.

Q. Was that at my request? A. It was.

Q. Do you recall the date?

A. It was September 10th. [197]

Q. What year was that? A. 1948.

Q. Where did you go?

(Testimony of Francis P. Owens.)

A. I went to a junk yard in Tacoma, in the tide flats of Tacoma.

Q. I beg your pardon?

A. It was located in the tide flat area of Tacoma.

Q. Was that the junk yard of Frank Powser & Company?      A. Yes, sir.

Q. You say you went there September 10th?

A. Yes, sir.

The Court: What year?

The Witness: 1948.

Q. What was the purpose of that trip?

A. Well, the request made of me was to go to Tacoma and withdraw a sample of liquid from the coils in question, if I could obtain such a sample, and to test the liquid and determine what it was.

Q. Would you look at Exhibits 7, 8, 9 and 10 and also 1, 2, 3 and 4? I believe 7, 8, 9 and 10 are more clear. Would you testify from them, please? Would you orient yourself with those exhibits? Did you say that the purpose of your trip was to withdraw a sample of the liquid?      A. Yes, sir.

Q. Would you tell the jury what you found? Would you [198] please describe that coil of pipe first and then tell the jury what you found?

A. Well, the coil as I found it consisted of two tiers of coils, and there were four pipes in each tier, and I paced the length of the coil off. It was approximately 21 feet long, and in trying to find—I could not find a portion in the pipe from which I could withdraw any liquid which might be present

(Testimony of Francis P. Owens.)

in it, and the coil as I observed it was a condenser type of coil. By that I mean it was one pipe within another pipe.

The inner pipe went the length of the pipe, and then welded onto the outside of it was another pipe which was closed and separate from the inner pipe, and I assumed that the inner pipe was a condenser type of coil. In other words, the liquid could be passed through it to warm what was in the outer coil, or it could have been vice versa. It could have been that the outer one was to cool what went through the inner one, but I couldn't find a place in the coil from which I could withdraw a sample. There was on the outer coil a T shaped coil which was welded to this outer coil, and around the base of this T coil that went onto the outer coil there were several areas that were badly corroded and which appeared to possibly have been corroded clear through and plugged at the time of the inspection by salts which did not permit liquid to come out of it, and of [199] course the coil was so heavy I couldn't move it.

It wasn't on a perfect level, it slanted to one end, but I did not make any attempt to move the coil because of its weight, and I did not make any attempt to try to get a sample from inside of it. However, I did take samples of salt around this corroded area at the base of the T.

Q. Why did you not obtain any liquid from the pipe itself?      A. Well, one reason was that—

(Testimony of Francis P. Owens.)

The Court: Is there anything different from what you have already said? I understood you had already explained that.

The Witness: One reason was it was too heavy, and the other, I didn't care to take any chance of seeing the corroded condition around the T break into the coil itself, which it might be under pressure, and if there were liquid in it, it possibly could spray out.

Q. Did you make the analysis of any salt that you scraped from the pipe, from that T section?

A. Yes, sir.

Q. What did you find the analysis to show?

A. It was primarily iron sulphate and it had a rather low Ph, as did the other samples. Its Ph was approximately 2 or less. [200]

The Court: What did you say the component elements in the salts were?

The Witness: Iron and sulphate, iron sulphate salt.

Q. Did you come to a conclusion as to what that Ph was?

A. Well, the opinion I had was that there was probably a little residual sulphuric acid in the salts, and that accounted for the Ph going so low.

Q. By being low, you mean a strong acid solution?

A. On the acid side, yes, sir.

Q. You stated that there was a salt you found chemically known as iron sulphate. How would that iron sulphate be formed?

(Testimony of Francis P. Owens.)

A. It could be formed by the reaction of iron with sulphuric acid.

Q. What would cause a liquid solution to spew forth from pipe at a great pressure? Would you state the chemical reactions that were involved?

A. When sulphuric acid reacts with iron, the gas hydrogen is evolved, and as the reaction continues, then the quantity of hydrogen that is produced increases. It creates a pressure within a closed system and if the pressure in that system is suddenly released, and there is liquid in the chamber in which the pressure is, it has a tendency to [201] carry the liquid out with the gas as it escapes.

Q. Assuming that this pipe were to receive a sharp blow and the sulphuric acid or sulphate salt would spew forth, what would be the reason chemically for it coming out in a gush, or with pressure?

A. Well, it is as I just explained. It is the natural tendency for the gas when it is evolved suddenly to carry with it a solution which surrounds it when that release is made.

Q. From your investigations and your chemical analyses subsequent, could you say that there was sulphuric acid in that pipe?

A. On the basis of our tests and investigations, it is my opinion that it did have sulphuric acid in it.

Q. What are the qualities of sulphuric acid?

A. It is of a corrosive nature. It has a tendency to cause burns. It has shipping regulations when it

(Testimony of Francis P. Owens.)

is shipped by railroads and so on. It has to contain what is called a white label which in turn signifies that it is corrosive, and when shipped to laboratories such as ours, it is shipped in containers which are labeled telling us to exercise caution in handling it because——

Mr. Preston: That is not responsive, if the Court please, and I move the answer be stricken and the jury instructed to disregard it. [202]

Mr. A. L. Maslan: I believe the answer is proper. I asked him what the qualities of sulphuric acid were.

The Court: He spoke about the precautions. The question did not call for the precautions in shipment. The stated precautions in shipment portion of his answer is stricken and the jury will disregard it. That part of the answer which is responsive to the question will stand.

Q. What precautions are taken to safeguard one handling sulphuric acid in shipment and in the ordinary handling of sulphuric acid in commerce?

Mr. Preston: That is not within the issues, if the Court please. We are not dealing with shipment here. We are getting off at a tangent.

The Court: I think that should be sustained. It is so ordered. Ask another question.

Q. Would you state that if sulphuric acid were not properly handled that it could be dangerous to human life and limb?



(Testimony of Francis P. Owens.)

Mr. Preston: That is repetitious and calls for a conclusion.

The Court: He has already spoken of its corrosive qualities. The objection is sustained. He spoke of the corrosive qualities of the [203] materials that he examined. Is this question directed to any such substance, whether that particular substance is involved in this accident or not? I am not ruling upon your right to do that, I am ruling upon the matter of further inquiry as to the corrosive qualities of the substance actually found here.

Q. You stated that you found a certain concentration of this sulphuric acid. You stated that it had a Ph of 2 and further you stated that there was 48 per cent, I believe, is that the percentage?

A. 48 per cent by volume, yes.

Q. 48 per cent by volume of the acid, is that true?

A. Yes, sir.

Q. Would you state that sulphuric acid of such a concentration was corrosive to human limb?

Mr. Preston: Objected to as repetitious, if the Court please?

The Court: I am going to overrule this objection and ask counsel to be content with this inquiry on this specific subject.

The Witness: I would say it was definitely corrosive.

Mr. A. L. Maslan: Take the witness. [204]

(Testimony of Francis P. Owens.)

Cross-Examination

By Mr. Preston:

Q. Whereabouts on the pipe did you notice the corrosion?

A. I noticed an appreciable amount of the corrosion around the base of the T which was welded onto the coil.

Q. Was that where there was an opening in the pipe?      A. No, sir.

Q. Did you see any opening from which any of this material came forth?

A. I didn't see any opening in the outer coil at all.

Q. In other words, you didn't get any liquid from inside of the pipe at all, did you?

A. No, sir.

Q. Your examination was confined to some—I believe you described as acid or salt or something of that kind on the outside?

A. Some residue which was taken from the corroded area around the base of the T.

Q. Am I correct in my description of what you found as salt or acid?

A. It was a liquid residue, a moist residue.

Q. Was there any corrosion any other place on the pipe?

A. I didn't notice any appreciable amount of corrosion [205] any place else.

Q. Have you any way of determining or esti-

(Testimony of Francis P. Owens.)

mating from your examination and your subsequent tests of this outside material as to how long that corrosion had been on the outside of the pipe?

A. No, sir.

Q. What is your best judgment as to that?

A. I wouldn't hazard a guess, because I don't know.

Q. Did it look like it had been recently corroded or had been corroded for a matter of years?

A. Well, I couldn't tell because iron corrodes at different rates and the metal is pitted quite severely around that area, but there are so many varying conditions that can inhibit or accelerate that rate of corrosion, I wouldn't know.

Q. Was the corrosion in the same area as the substance in which you made your tests?

A. Yes, sir.

Q. In other words, when this material appeared on the outside of the pipe it apparently started corroding because the areas were identical, -as I take it? Do you understand what I mean?

A. No, I don't know what you mean by identical.

Q. I thought you said the areas of corrosion was the same as the area of this deposit that you examined? [206]

A. That is right, it was around the perimeter of the T pipe was corroded, and it was from that area that I took my salts.

Q. You say that spewing forth—you used that

(Testimony of Francis P. Owens.)

term—of this material would indicate that it was under pressure?      A. I did, yes.

Q. Would such pressure be formed unless that pipe was tightly closed?      A. No, sir.

Q. It would have to be tightly closed?

A. Yes, sir.

Q. How long in your judgment could that pressure be built up inside of a coil such as you saw, materials, liquids such as you determined were in the pipe?

A. I have no way of knowing. That would depend upon the gauge of the pipe itself and any corroded areas in it. If there were no corroded areas, it could probably withstand a very great pressure. If there were corroded areas in it, and iron had become thin in those areas, the pressure it could stand would be appreciably diminished, so I really don't know.

Q. As I understand, was this substance which you determined was in this pipe—was that corrosive to metal?

A. Well, with the Ph that it had, it could be corrosive to metal but basically it [207] appeared to be the residue from corrosion of the metal.

Q. Is there any way that you could determine whether, for instance, that pipe could have had acid in it for a period, say, eight years after it had been taken from the plant?

A. No, there is no way I could tell that.

Q. From your experience, would you say that if

(Testimony of Francis P. Owens.)

a pipe of that kind were closed for eight years, that the pressure that would have built up would have been indicated before eight years later?

A. I have had no direct experience to tell that, but I do know that acid in such a pipe could be there for a long period of time without any appreciable corrosion whatsoever.

Q. How about the pressure?

A. That would follow also, it is possible. It could be in there for a long period of time without any pressure being created, because the acid under some conditions can make the iron or steel paved. In other words, it forms a film of hydrogen over it and the acid cannot penetrate that film of hydrogen and cause corrosion.

Q. Do you know of any such cases of your own knowledge?

A. Only those about which I have read. I have never seen any. [208]

Q. You have never seen it happen yourself?

A. No, sir.

Q. I noticed at the start of your testimony you said something about being dangerous to touch this clothing here in the exhibit, but perhaps I misunderstood you, because I noticed you handling it quite freely, brushing your hands off. Did I misunderstand your testimony?

A. No, sir, you didn't.

Q. Have you suffered any injury from doing that?

A. No, sir.

Mr. Preston: That is all.

(Testimony of Francis P. Owens.)

Mr. A. L. Maslan: That is all. I will want to offer these in evidence. Is there an objection?

Mr. Preston: You said you would connect them up.

Mr. A. L. Maslan: I will connect them up.

The Court: This witness should remain in attendance until later excused.

Those connected with this case will be excused for at least ten minutes.

(Recess.)

Mr. Ben Maslan: There are one or two questions. I want to submit to the Court in the absence of the jury, whether or not we have to produce evidence as to the mortality or life expectancy tables, or whether Your Honor under the rulings of the State of Washington [209] Supreme Court takes judicial notice.

The Court: No, I will not take judicial notice.

Mr. Ben Maslan: All right, we have such testimony.

There is another question. The question was raised about 10:30 last night relative to the election made by the plaintiff in this case. Your Honor will recall the statute which reads: "Workman means every person in this state, who is engaged in the employment of any employer coming under this Act whether by way of manual labor or otherwise in the course of his employment: Provided, however, that if the injury to a workman is due to the negligence or wrong of another not in the same



employ, the injured workman, or if death result from the injury, his widow, children, or dependents, as the case may be, shall elect whether to take under this Act or seek a remedy against such other, such election to be in advance of any suit under this section; and if he take under this Act, the cause of action against such other shall be assigned to the state for the benefit of the accident fund; and if the other choice is made, the accident fund shall contribute only the deficiency, . . .”.

We have here all the files, and Mr. A. L. Maslan can testify, Mr. Haynes can testify, we have someone [210] here from the Washington State Department involved with their records, all showing that an election had been made. The question is whether we can present it here in the absence of the jury so that Your Honor can take cognizance of that.

The Court: Is there any objection to presenting it in the absence of the jury, or do you insist that it be presented in the presence of the jury?

Mr. Preston: I think it is proper for all testimony except that which is offered only by way of an offer of proof, to be in the presence of the jury.

The Court: You may present it in the presence of the jury. You should have the opportunity of putting in definite testimony bearing upon such election, but I do not think it is incumbent upon you to put in all of the possible testimony that you could find upon that question, if there is more than is needed.

Bring in the jury.

All of the jurors have returned to their places as before, and likewise all parties on trial with their counsel. You may proceed.

Mr. Preston: I would like to recall Mr. Owens for another question.

The Court: Mr. Owens will resume the stand for further examination. [211]

FRANCIS P. OWENS

recalled as a witness by and on behalf of plaintiff, having been previously duly sworn, was examined and testified as follows:

Cross-Examination

(Continued)

By Mr. Preston:

Q. I understood you to say that the test you made indicated that this sample of sulphuric acid that you took was 48 per cent by volume?

A. Yes, sir.

Q. Assuming that in the use of this sulphuric acid in the plant of the defendant Pennsylvania Salt Manufacturing Company was—that the sulphuric acid there used was 80 per cent in volume, that would indicate to you that there had been a dilution of this somewhere along the line?

A. Yes, sir, it would indicate a dilution or loss of water.

Q. Would that be a loss by water, by the addition of water?

A. Well, it would either be a dilution with water

(Testimony of Francis P. Owens.)

or a loss by evaporation of water that was originally in the mixture.

Q. Would flushing of such a pipe with water tend to [212] dilute the volume of what sulphuric acid there was in the pipe? A. Yes, sir.

Q. That could account for the diminution in volume of this particular sample that you found, is that right? A. It could, yes, sir.

Mr. Preston: That is all.

### Redirect Examination

By Mr. A. L. Maslan:

Q. But counsel just asked you whether flushing could dilute the pipe, that is, could dilute the concentration of the sulphuric acid, is that not so?

A. Yes, sir.

Q. And that is the reason why the sulphuric acid was reduced from the concentrated strength of 80 per cent to 48 per cent, is that right, if it were flushed? A. It could, yes, sir.

Q. However, if it were thoroughly flushed, all of the sulphuric acid should have been out, should it not?

A. It could have been, if it were thoroughly flushed.

Q. Also, could not the sulphuric acid have become diluted by atmospheric conditions, and sun rays and rain also?

A. It could have been so diluted. [213]

(Testimony of Francis P. Owens.)

Q. Would not the fact that a salt was present show that there was evaporation also?

A. Usually in the reaction of your acid with the iron the hydrogen is evolved, and it is from the acid itself, and it doesn't necessarily affect the water, the volume of original water that was concerned.

The Court: Read the question.

(Last question read by reporter.)

The Court: I ask the witness to think of that question, not some other one, and answer it directly.

The Witness: It would not.

Q. What would the salt show?

A. The salt would show that there had been a reaction between the acid and the iron.

Q. And the fact that you found sulphuric acid there would show you that there had not been a complete flushing, would it not?      A. Yes, sir.

Mr. A. L. Maslan: That is all.

### Recross-Examination

By Mr. Preston:

Q. Do you know of your own knowledge whether a coil such as you saw when you made this examination could be completely flushed out, of your own knowledge? [214]

A. I believe that it could be.

Q. I say from your own knowledge? For instance, let me ask you this, you didn't see the inside of the coil?      A. No, sir.

(Testimony of Francis P. Owens.)

Q. You never saw the coil before?

A. No, sir.

Q. Have you yourself ever flushed out or assisted or observed the flushing out of a coil such as you saw on this particular day?

A. No, sir.

Mr. Preston: That is all.

Mr. A. L. Maslan: Whether it was completely flushed out or not, if there was sulphuric acid in it, that would be dangerous, would it not?

The Witness: Yes, sir.

Mr. A. L. Maslan: That is all.

The Court: Step down.

(Witness excused.)

### ARTHUR KEHLE

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows: [215]

#### Direct Examination

By Mr. Ben Maslan:

Q. What is your name, please?

A. Arthur Kehle.

Q. Where do you live?

A. At 12505 20th N. E., Seattle.

Q. How long have you lived in Seattle?

A. Fifteen years.

Q. What is your business or occupation?

A. Life insurance sales.

(Testimony of Arthur Kehle.)

Q. You have a managerial or executive position?

A. Yes, I am assistant manager.

Q. Of what company?

A. The Equitable Life Insurance Company of Iowa.

Q. How long have you been in the insurance business?      A. Fifteen years.

Q. With the same company?      A. Yes, sir.

Q. Do you have occasion during your work as such assistant manager—by the way, what territory do you take in?

A. The state of Washington, primarily western Washington.

Q. In your work as such, do you have occasion to become familiar with what are known as mortality tables or life expectancy tables? [216]

A. Yes, sir.

Q. What tables are commonly used in your business and in this vicinity?

A. Up to 1939, we used the American Table of Mortality, and then for approximately a year we were using the American Men's Table of Mortality, but in 1941 the insurance commissioners established what is known as the Commissioners' Standard Ordinary Table, which is now in use.

Q. Commissioners' Standard Ordinary Table?

A. Yes.

Q. By the commissioners you mean whom?

A. The insurance commissioners of the various states.



(Testimony of Arthur Kehle.)

Q. Is that table being generally used at the present time?

A. Yes, with our company and the majority of others also.

The Court: The commissioners what?

The Witness: The Commissioners' Standard Ordinary Table.

Q. Do you have a copy of that Commissioners' Standard Ordinary Table?           A. Yes.

Q. Will you open it to the page, please? I think you have it contained in a booklet. [217]

A. Yes, I have it in my rate book.

The Court: Does it have a page number?

Mr. Ben Maslan: It is Page No. M-15, and along side of that are some figures, 4-46.

(Mortality Table marked Plaintiff's Exhibit 23 for identification.)

The Court: I would like to give the witness an opportunity to give that exhibit a name if he thinks there is a name that is attributable to it that reflects the character of the information contained in it.

Q. May I inquire whether or not that page can be taken out of that book without damage to the book?           A. Yes, it can.

Q. Would you please take that out of the book?

The Court: In connection with your request to the witness, do you request that it be understood that the clerk's identifying marks to be attributable

(Testimony of Arthur Kehle.)

Q. You have a managerial or executive position?

A. Yes, I am assistant manager.

Q. Of what company?

A. The Equitable Life Insurance Company of Iowa.

Q. How long have you been in the insurance business?      A. Fifteen years.

Q. With the same company?      A. Yes, sir.

Q. Do you have occasion during your work as such assistant manager—by the way, what territory do you take in?

A. The state of Washington, primarily western Washington.

Q. In your work as such, do you have occasion to become familiar with what are known as mortality tables or life expectancy tables? [216]

A. Yes, sir.

Q. What tables are commonly used in your business and in this vicinity?

A. Up to 1939, we used the American Table of Mortality, and then for approximately a year we were using the American Men's Table of Mortality, but in 1941 the insurance commissioners established what is known as the Commissioners' Standard Ordinary Table, which is now in use.

Q. Commissioners' Standard Ordinary Table?

A. Yes.

Q. By the commissioners you mean whom?

A. The insurance commissioners of the various states.

(Testimony of Arthur Kehle.)

Q. Is that table being generally used at the present time?

A. Yes, with our company and the majority of others also.

The Court: The commissioners what?

The Witness: The Commissioners' Standard Ordinary Table.

Q. Do you have a copy of that Commissioners' Standard Ordinary Table?      A. Yes.

Q. Will you open it to the page, please? I think you have it contained in a booklet. [217]

A. Yes, I have it in my rate book.

The Court: Does it have a page number?

Mr. Ben Maslan: It is Page No. M-15, and along side of that are some figures, 4-46.

(Mortality Table marked Plaintiff's Exhibit 23 for identification.)

The Court: I would like to give the witness an opportunity to give that exhibit a name if he thinks there is a name that is attributable to it that reflects the character of the information contained in it.

Q. May I inquire whether or not that page can be taken out of that book without damage to the book?      A. Yes, it can.

Q. Would you please take that out of the book?

The Court: In connection with your request to the witness, do you request that it be understood that the clerk's identifying marks to be attributable

(Testimony of Arthur Kehle.)

to the remaining part which has been marked, the part that he is taking out?

Mr. Ben Maslan: The identifying mark is attached only to that page, I understand.

The Court: Then your question should refer only to what is left as the exhibit. [218]

Mr. Ben Maslan: That is correct, Your Honor.

The Court: The Court authorizes the witness to return to his pocket what is now left of the book, and the Court directs that the bailiff now let counsel on both sides see what is marked as Plaintiff's Exhibit 23.

Mr. Ben Maslan: I offer that Table in evidence, being Plaintiff's Exhibit 23.

The Court: Is there any objection?

Mr. Preston: No objection.

The Court: Plaintiff's Exhibit 23 is now admitted.

(Plaintiff's Exhibit 23 received in evidence.)

The Court: I still would like to know what it is, if you will give the witness an opportunity to state what it is.

Q. Will you explain what that is?

The Court: Give it a one word name if you can which reflects the character or kind of information contained in the exhibit.

The Witness: It is a mortality table.

Q. Referring to Exhibit 23, the mortality table,

(Testimony of Arthur Kehle.)

I will ask you what life expectancy is shown for a person [219] 23 years of age?

A. For a person 23 years of age, the average life expectancy is 43.88 years.

The Court: 43.88?

The Witness: Yes, sir.

Q. There are other expectancy tables, are there not? A. Yes.

Q. Would you say that this is the latest and the one now usually accepted by insurance actuaries?

A. I might say that the lower right hand corner showing the 4-46 means that this table was modernized in April of 1946 so it is the most recent.

Mr. Ben Maslan: You may examine.

Mr. Preston: No questions.

The Court: You may step down.

(Witness excused.)

### DONALD HILLIARD

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows: [220]

#### Direct Examination

By Mr. Ben Maslan:

Q. What is your name?

A. Donald Hilliard.

Q. Your residence is where?

A. 1809 10th Avenue N. W., Seattle.

(Testimony of Donald Hilliard.)

Q. How long have you lived in Seattle?

A. About 12 years.

Q. What is your business or occupation?

A. Certified Public Accountant.

Q. Where did you take your work, your university work or studies?

A. At the University of Washington.

Q. What degree did you receive there?

A. Bachelor of Business Administration.

Q. Did you take any examinations for that Certified Public Accountancy that you have?

A. Yes.

Q. Where was that? A. In Seattle.

Q. Under what jurisdiction?

A. The Washington Society of Certified Public Accountants, an examination of the American Institute.

Q. Is that a state regulated body?

A. It is. [221]

Q. Do you have any certificate from the State of Washington? A. I do.

Q. What is that certificate?

A. Certified Public Accountant.

Q. How long ago is it that you received your certificate as such? A. Nine years.

Q. During all of that time have you been practicing your public accountancy?

A. No, I was in the Army two years.

Q. What was your work in the Army?

A. I was auditing war contracts.



(Testimony of Donald Hilliard.)

Q. Are you in the practice of Certified Public Accountancy in Seattle?      A. Yes.

Q. Where is your office?

A. Second & Cherry Building.

Q. Are you a member of any firm?

A. Barrios, Hilliard, Sain & Company.

Q. Does that firm have just one office in Seattle?

A. Only one office in Seattle.

Q. Do you have other offices?      A. Yes, sir.

Q. Where? [222]

A. New York, Los Angeles, and New Orleans.

Q. In other words, this is a partnership?

A. Yes, sir.

Q. It has offices in these various cities you have mentioned including the one here in Seattle?

A. Yes, sir.

Q. At my request, you made some studies of figures based upon mortality tables or life expectancy tables, did you not?

A. I didn't make the study on the table, on life expectancy tables. I made computations based on annuity tables.

Q. You took more than one mortality, life expectancy table in your computation?

A. That's right.

Q. Which one did you use?

A. I used 40.17 years, 43.88 years.

Q. Those will be sufficient, I think, just those two for the time being. 43.88, that is the period that was mentioned by this last witness?

(Testimony of Donald Hilliard.)

A. Yes, sir.

Q. In order to procure an income each year for a period of, let's say, 40 years of \$3000 per year, how much money would a person have to invest if he could safely invest such money at  $2\frac{1}{2}$  per cent per annum? [223]

Mr. Preston: Just a minute, if the Court please. We object to that as entirely incompetent, irrelevant and immaterial. The evidence in this case—there is no evidence of permanent total disability. The evidence is to the contrary. How could this be in any way helpful under those circumstances, and what qualification has there been shown from an investment standpoint of this witness making such a computation, assuming it were otherwise admissible or relevant. I object to it.

Mr. Ben Maslan: First of all, we do have definite evidence in the record that this man is industrially blind, that at the present time he is unable to work, and there is nothing to the contrary as far as the future is concerned. There is possibility, there is plausibility, there is conjecture that he might recover, etc., and that question of course is a matter for the jury to determine, percentages of recovery in the event of any recovery, whether there can be in the future ability to work, what percentage of ability to work may return and so forth.

The Court: The objection is overruled. As to the rate of return mentioned in the question as well as the other elements in the question, the right

(Testimony of Donald Hilliard.)

of [224] cross-examination will be reserved to defendant.

Q. Would you repeat the question.

(Last question read by reporter.)

The Court: Before answer is made, I ask counsel interrogating to state the reasons for using the 2½ per cent figure. Is there anything in the evidence on which that condition is stated?

Mr. Ben Maslan: No. That is a matter for argument as to the knowledge of the jurors from their individual outlook on life, and experience in life, the test being—I will give you the exact language of our Supreme Court on this very subject, where 2½ per cent was accepted as a figure. Although they said that it is not binding, they did accept 2½ per cent. They said, however, that is a matter for the jurors in their experience.

The Court: The question I wish you to answer when you make answer is whether or not that percentage figure has been approved in a similar question in another case and has been approved by the State Supreme Court.

Mr. Ben Maslan: Yes, Your Honor. I am going to ask on some other percentages, too, so as to give the jurors the possibility of figuring this thing out themselves. [225]

The Court: I will have to let you proceed.

Mr. Ben Maslan: You may answer the question. Is that my understanding, Your Honor?

(Testimony of Donald Hilliard.)

The Court: You may propound this question.

The Witness: The present value would be \$75,-308.33.

Q. In other words, it would require that much of an investment today to procure such a return?

A. \$300. a year for 40 years—no, \$3000. a year.

Q. Assuming instead of \$3000. per year, what amount will be necessary to invest at the same rate, 2½ per cent, to procure a return of \$4000. per year for a period of, say, 40 years?

A. \$100,411.10.

Q. Let's put it this way now, what would it take to earn—what amount of money is necessary to invest at 2½ per cent to procure a return for 40 years of \$5000. per year?

Mr. Preston: That is objected to, if the Court please. There is no evidence.

The Court: There is no evidence up to now about \$5000., is there?

Mr. Ben Maslan: There is some evidence as I recall of Mr. Radinsky that up to this time this year his successor earned \$4500. I believe that was [226] the testimony, approximately \$100. per week, which is in the neighborhood of \$5000. per year. These are naturally approximate figures so that the jurors may judge the value.

The Court: I think the approximate figure should be within the limits of the evidence, and your last statement indicates that the \$5000. is not an accurate reflection of the testimony.

(Testimony of Donald Hilliard.).

Mr. Ben Maslan: My recollection—and I will be guided, of course, by the actual testimony—my recollection was that Mr. Radinsky did testify that during the year of 1949 to the present time the successor in the exact job earned \$4500. I may be mistaken and I will be corrected if I am. I think there are some exhibits which might throw some light on that.

Q. Will you answer that question?

Mr. Preston: We objected to the question.

The Court: I sustain that objection. You will have to submit the testimony as to the amount of the income. The testimony concerning the figure mentioned by you now was as to the time since February 20, 1948, to the end of that year.

Mr. Ben Maslan: That testimony has already been given previously but I am talking now about the [227] testimony for the year 1949, Your Honor. If I may, I think it will only take me a minute to look at this record.

The Court: You may do that.

Mr. Ben Maslan: I stand corrected, Your Honor. The figure was \$4500. for the entire year of 1949 and I will rephrase that question if I may?

The Court: Then the Court's statement will likewise be corrected because I made a mistatement according to your last information.

Q. Could you please give us the amount that would be necessary to invest at  $2\frac{1}{2}$  per cent per annum to produce during a 40 year period \$4500. per year?

(Testimony of Donald Hilliard.)

A. I couldn't offhand. It would take three or four minutes for me to compute that amount. I have it only on the even amounts.

Q. In other words, you had made your figures based on the \$5000. I requested?

A. That's right.

Q. You say it would take you two or three minutes? A. Well, three or four.

The Court: Ask him another question.

Q. Let me ask you this, you couldn't say what it would be for \$4500. Would that or would that not be half way in between the figures for \$4000. and \$5000.? [228] A. It would not.

Q. It is a different formula? A. Yes.

Q. Taking the figures for 43.88 or as close as you can to that number of years, how much would it take to invest at the present time at  $2\frac{1}{2}$  per cent per annum to procure \$3000. per year for that period of time?

Mr. Preston: It is understood, if the Court please, that our objection runs to all of these questions.

The Court: Let it be so understood and overruled.

The Witness: The present value, \$3000. for 43 years, would be \$71,945.71.

Q. On the basis of \$4000. per year, do you have those figures?

A. Yes, sir. Present value, \$4000. per year at 3 per cent is \$95,000.00.



(Testimony of Donald Hilliard.)

Q. I think you have my figures. I asked for  $2\frac{1}{2}$  per cent.

A. I thought I had already gone over those.

Q. Will you give me the  $2\frac{1}{2}$  per cent figure on \$3000. per year?

A. That is \$78,499.34.

Q. And you don't have the figures for \$4500., do you? [229]

A. No, I do not.

Q. If a person could procure a safe investment at 3 per cent per annum, let's get the figures on that. What sum would be necessary that the person would have to invest at 3 per cent per annum to produce \$3000. per year for 40 years?

A. The amount would be \$69,344.32.

Q. What amount would the person be required to have to invest at 3 per cent per annum to receive \$4000. per year for 40 years?

A. \$92,459.08.

Q. I gather that you don't have the figures for \$4500. per year, that being my error?

A. No, I do not.

Q. On the basis of 43 years, what would be required to invest at 3 per cent to procure \$3000. per year for 43 years?

A. \$71,945.71.

Q. What investment would be required if made at 3 per cent per annum to receive \$4000. per year for 43 years?

A. \$95,927.60.

Mr. Ben Maslan: You may examine.

Mr. Preston: In lieu of cross-examination is a motion to strike for the same reason assigned and

(Testimony of Donald Hilliard.)

for the further reason that the evidence assumes—the [230] testimony of the witness assumes without any evidence to support it that a person at the age of 23 years is going to earn these figures for 40 or 43 years and be earning them during that period. That is the additional ground of our motion to strike the entire testimony of this witness insofar as he has given any figures to the jury.

The Court: The motion is denied. Is there any cross-examination?

Mr. Preston: No, in lieu of cross-examination we move to strike.

The Court: You may be excused from the stand.

(Witness excused.)

### GEORGE HAYNES

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. A. L. Maslan:

Q. Your name is George Haynes?

A. Right.

Q. Where do you live? [231]

A. 2710 Yesler Way, Seattle.

Q. 2710 Yesler Way, Seattle, Washington?

A. Yes, sir.

Q. Are you a married man?

A. Yes, sir.

(Testimony of George Haynes.)

Q. Are you Oscar Haynes' father?

A. Yes, sir.

Q. How many children do you have?

A. Seven.

Q. How old is Oscar now?

A. He was born in 1926.

Q. Would you say he is 23 years old now?

A. Yes, sir.

Q. Is he the oldest?                      A. Yes, sir.

Q. Where do you work?

A. I work at 2750 Fourth Avenue South.

Q. For whom do you work?

Mr. Preston: Is that material, if the Court please?

The Court: The objection is sustained.

Mr. A. L. Maslan: We are just qualifying him.

The Court: You might ask him if he knew anything about the accident?

Mr. A. L. Maslan: I am coming to that. [232]

The Court: Go to that directly.

Q. Do you recall the accident that happened to Oscar?                      A. Yes, sir.

Q. When did you first learn about the accident?

A. February 20, 1948.

Q. What time of day?

A. About between four and five o'clock, I presume.

Q. What did you do as soon as you found out about the accident?

(Testimony of George Haynes.)

A. I rushed home and got the wife and we went to the hospital.

Q. Where was the hospital?

A. In Tacoma, Washington.

Q. What did you find when you got to the hospital?

A. I found my boy there with his head all bound up and swollen and in terrible pain.

Q. What gave you the thought that he was in terrible pain?

Mr. Preston: This is cumulative. There is no dispute about this, is there?

The Court: The objection will be overruled. If there is no dispute, plaintiff may consider that, and in view of opposing counsel's statement, I think counsel for plaintiff would wish to be as brief as [233] possible.

Mr. A. L. Maslan: I am going to make it very brief. I am also coming to the steps in relation to the admission of this evidence. I feel that it is necessary to proceed as follows:

Q. How long was Oscar in the hospital?

Mr. Preston: We concede it was 58 days and the record so shows.

Q. Do you remember what Oscar was wearing the day of the accident?      A. Yes, sir.

Q. What was he wearing?

A. Those clothes on the table.

Q. Where did you get these items of clothing?

(Testimony of George Haynes.)

A. From the hospital, from where he was at in Tacoma.

Q. Did you pursuant to my direction and in my presence deliver these articles of clothing to Mr. Owens, the chemist?           A. Yes, sir.

Q. For analysis?           A. Yes, sir.

Q. And this is the same clothing?

A. It is.

Q. You recognize this clothing as such?

A. Yes, sir. [234]

Q. This bottle as has been testified contained some liquid or some compound. Where did you get that compound?

A. From the trailer part of the truck that the boy was hurt on, from where it had spewed out and had piled up there on the truck.

Q. How did you happen to notice that?

A. It was in the yard and I went to see it the next morning when I went to work. This was lying there of necessity over the back of the truck so I took a stick and scraped some of that stuff off into the bottle.

Q. And that was in this bottle?

A. Yes, sir.

Q. Pursuant to my direction, you delivered that over to the chemist at a later date?

A. That's right.

Mr. A. L. Maslan: At this time, may it please Your Honor, I offer these articles in evidence, Exhibit 22.

(Testimony of George Haynes.)

The Court: Exhibit 22 is now admitted.

(Plaintiff's Exhibit 22 received in evidence.)

Mr. A. L. Maslan: Take the witness.

Mr. Preston: I have no questions.

The Court: You may step down. [235]

(Witness excused.)

Mr. Ben Maslan: I will call Oscar Haynes.

The Court: Do you recall the plaintiff?

Mr. Ben Maslan: Yes, Your Honor, for a question relative to the election that was discussed. The record will show that the plaintiff is now back on the witness stand.

The Court: He has been previously sworn and he may now further testify.

### OSCAR VIRGIL HAYNES

recalled as a witness by and on behalf of plaintiff, having been previously duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Ben Maslan:

Q. I think you testified earlier in the case that you were working for B. Radinsky & Son and that as such workman you were under the Workmen's Compensation Act?      A. Yes, sir.

Q. Prior to the start of the trial of this case against the Pennsylvania Salt Manufacturing Com-



(Testimony of Oscar Virgil Haynes.)

pany, did you or did you not elect or choose to sue or go against [236] the Pennsylvania Salt Manufacturing Company rather than against the Workmen's Compensation Fund?      A. I did.

Mr. Ben Maslan: You may examine.

Cross-Examination

By Mr. Preston:

Q. When did you make the election?

A. It was after I come out of the hospital.

Q. By what means?

A. I consulted my lawyer.

Q. You had previously made claim to the Department of Labor and Industries on the basis of this accident, hadn't you?      A. Yes, sir.

Q. And you had received payments thereunder, had you not?      A. I received two.

Q. Two payments from the State?

A. Yes, sir.

Q. Do you remember the amounts of those approximately?      A. \$75.00, I believe.

Q. Was that election you made by some writing?

A. I signed something in the hospital, it was just a few days after I was there. I don't exactly know what it [237] was.

Q. I am speaking not of your original claim to the Department, but you spoke of an election afterwards not to take, as you termed it, under the Act but to maintain a third party action and that is

(Testimony of Oscar Virgil Haynes.)

what I am inquiring about, as to what form that election took?

The Court: If you remember the form of it you can now state; if you do not remember and cannot answer you are entitled to say what the fact is about your ability to answer.

The Witness: I don't remember that.

Q. You answered counsel to the effect that you made an election, but you don't remember whether it was oral or writing or what, I take it, is that correct?

A. I believe that was in writing.

Q. You signed something in writing?

A. Yes, sir.

Q. Would you produce that please?

Mr. A. L. Maslan: We have the original file.

The Court: Produce it for the inspection of counsel cross-examining.

Mr. Ben Maslan: While the records are being produced, the moneys that you received from the Department of Labor and Industries were returned at your direction by your lawyer, A. L. Maslan to the [238] Department of Labor and Industries, isn't that correct?

The Witness: They were.

Mr. Ben Maslan: So that actually you have in actual fact never received any money from the Department of Labor and Industries?

The Witness: No, sir.

Mr. Ben Maslan: As soon as you were advised

(Testimony of Oscar Virgil Haynes.)

of your rights by your lawyer, you have always taken the position that your suit, your claim, is against the Salt Manufacturing Company?

The Witness: Yes, sir.

Mr. A. L. Maslan: May I make this suggestion?

The Court: Yes.

Mr. A. L. Maslan: These are the original records of the Department of Labor. May we introduce these with the privilege of having copies substituted at a later date?

The Court: Before the Court answers, I would like to get the attitude of opposing counsel and he probably will want to look at them for a moment.

Mr. Preston: I would like to look at them, but I imagine that would be perfectly all right.

Mr. Ben Maslan: There are some things that are not germane to this question. I think perhaps we should take them out. [239]

The Court: As I understand, the election, the form of election is now under consideration?

Mr. Ben Maslan: Yes, Your Honor.

The Court: Give attention to that and leave the other matters for some other time.

Mr. Ben Maslan: When was it that you retained A. L. Maslan, or our law firm, Maslan & Maslan at that time, since then, Maslan, Maslan & Hanan, to press your claim against the Pennsylvania Salt Manufacturing Company?

The Witness: I believe it was in the month of July.

(Testimony of Oscar Virgil Haynes.)

Mr. Ben Maslan: Of 1948?

The Witness: Yes, sir.

The Court: I think counsel should be familiar with these records.

Mr. Ben Maslan: This is the Department of Labor record, Your Honor.

The Court: Let opposing counsel look at it.

Mr. Starin: We are entitled to see the record as a whole, if the Court please. It is a public document.

Mr. Ben Maslan: I am not trying to hold anything from you, counsel.

The Court: The Court will let counsel for both [240] sides have another five minutes while we are all together to see if you can find what you are looking for. Act as expeditiously as possible. Do you have available copies?

Mr. Ben Maslan: We do not have available copies but we will take out the appropriate parts, with counsel's aid.

The Court: Will counsel on both sides take out the part of the file which they wish to use and further deal with it? Remove it so that you will have it in a form to expedite the physical work in that respect.

(Compensation records marked Plaintiff's Exhibit 24 for identification.)

Mr. Ben Maslan: Your Honor, I offer that portion of the Department of Labor records as evi-

(Testimony of Oscar Virgil Haynes.)

dence purely on the question of election of remedies.

The Court: Is there any objection?

Mr. Preston: Yes, Your Honor. I asked for one thing and that was the writing to the effect that an election was made, propounded by counsel. That is all I inquired about. These other matters are immaterial. The only thing that has any relevancy is [241] the one letter I asked for.

The Court: Does Plaintiff's Exhibit 24 contain that letter?

Mr. Ben Maslan: It contains that.

Mr. Preston: And a number of others, Your Honor.

Mr. Ben Maslan: They are all part and parcel of that, Your Honor. You can't disengage one.

The Court: You will have to prove that.

Mr. Ben Maslan: I will be glad to have Your Honor see this.

The Court: You will have to ask the proper witness concerning proper authentication of the entire exhibit, including all parts thereof.

Mr. Ben Maslan: A. L. Maslan, will you please take the witness stand.

The Court: Do you wish this witness excused from the witness stand?

Mr. Ben Maslan: For the time being, Your Honor.

The Court: You may step down.

(Witness excused.)

The Court: Do you wish to reserve the right to have this witness argue the case before the jury?

Mr. Ben Maslan: I would like to have that reservation, but if he is going to argue he will argue on other questions entirely, nothing to do with this. [242]

The Court: I don't think we had better get into the question of possible error or incorrectness or inaccuracy as to what he is going to argue. Is there any objection to this witness reserving the right to argue this case before the jury?

Mr. Preston: I think that is the general rule, if he takes the stand in a case, he couldn't argue.

Mr. Ben Maslan: The witness will waive the right to argue.

#### A. L. MASLAN

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Ben Maslan:

Q. Your name is A. L. Maslan?

A. Yes, sir.

Q. And you are an attorney at law?

A. That is right.

Q. Admitted to practice in this Court and in the courts of the state of Washington?

A. That is right. [243]

Q. I believe in April or May, 1948, you were



(Testimony of A. L. Maslan.)

contacted and retained by Oscar Haynes, the plaintiff in this action to take some action for him in regard to injuries that he had sustained in an accident?      A. I did, I was, rather.

Q. Is that the particular accident that we have been trying this case about, the one that occurred on February 20, 1948?      A. That is right.

Q. What was your first action, if any, taken by you in connection with the election required under the Statute?

A. I addressed a letter to the Department of Labor and Industries dated May 4, 1948.

Q. If you will look back, you will find one in April, I think. Isn't there something in connection with Mr. Haynes' signature or authorization?

A. Attached to that letter of May 4th was a letter also addressed to the Department of Labor and Industries dated April 26, 1948, signed by Oscar Haynes and O.K.'d by George Haynes as the father.

Q. Then when next did you write, either you or Oscar Haynes or you for Oscar Haynes write a letter to the Department of Labor and Industries relative to the situation?

A. I then wrote on May 11, 1948 to the Department of [244] Labor and Industries.

Mr. Preston: Your Honor, I object. The exhibit speaks for itself.

Mr. Ben Maslan: I offer these exhibits in evidence, Your Honor.

Mr. Preston: I am speaking of the one thing

(Testimony of A. L. Maslan.)

we inquired about, and that was the writing evidencing an election. I didn't inquire about anything else, and other preliminary steps, I submit, are of no consequence or materiality and the letter speaks for itself. It is dated and says what subject matter we are discussing.

The Court: The jury will be excused until 2:00 o'clock and may now retire under the Court's previous admonitions.

I suggest that you remove from Plaintiff's Exhibit 24 that paper which admittedly is admissible and give it a different clerk's identifying mark and then afterwards deal with the remaining portions of Plaintiff's Exhibit 24 in such manner as you may be advised. Will counsel separate that one which both sides agree is admissible? Is that the one defendant admits is admissible? Let it be marked Plaintiff's Exhibit 25. It is taken from Plaintiff's Exhibit 24 for identification. [245]

(6-8-48 Letter marked Plaintiff's Exhibit 25 for identification.)

The Court: Do you offer Plaintiff's Exhibit 25 in evidence?

Mr. Ben Maslan: Yes, Your Honor.

The Court: Is there any objection?

Mr. Preston: No objection.

The Court: Plaintiff's Exhibit 25 is now admitted.

(Plaintiff's Exhibit 25 received in evidence.)

The Court: The Court is about to take the noon

(Testimony of A. L. Maslan.)

recess. Is there anything you wish to do in the absence of the jury?

Mr. Ben Maslan: I think we can discuss this now. I have some other letters here. We have this letter of May 4th. I may read it to show it is along the same line.

The Court: If you have reason to believe that it is admissible and will be later admitted, even over objection, I suggest you have the matter given another mark so that the record will show at all times to what you refer.

(5-4-48 and 4-26-48 Letters marked Plaintiff's Exhibit 26 for identification.) [246]

The Court: Let defendant's counsel see Exhibit 26. Mr. Maslan, can you give Plaintiff's Exhibit 26 for identification a name which you believe will not be objectionable in the minds of defendant's counsel?

Mr. Ben Maslan: Your Honor, may I refer to Plaintiff's Exhibit 26 for identification? This is a letter dated May 4th, 1948. It is addressed to the Department of Labor and Industries, Olympia, Washington.

"Gentlemen:

In Re: Oscar Haynes—B-575 312

Enclosed herewith find letter of Authority signed by Oscar Haynes.

For your information we are contemplating taking proceedings against the Penn. Salt Company

(Testimony of A. L. Maslan.)

for personal injuries sustained by Mr. Haynes. We feel that he is entitled to substantial damages against the chemical company. I presume that it would meet with your approval in the event that we are able to sustain a case against the chemical company.

We would appreciate your sending the file to your Seattle Office so that we might peruse the same so that we might obtain possible information in regard to the proposed action against the said Company. [247]

I would be pleased to discuss this matter with your agent in charge of this particular case and would appreciate hearing from you at your earliest convenience."

It is signed Maslan & Maslan, by A. L. Maslan.

Attached to that, signed by the plaintiff himself, witnessed by George Haynes, the father, is a letter dated April 26, 1948, to the Department of Labor & Industries, Olympia, Washington.

"Gentlemen:

Re: Oscar Haynes—B-575 312

This will advise that I have retained the firm of Maslan & Maslan to prosecute my claim for damages for personal injuries sustained when I was injured on the 20th day of Feb., 1948, in Tacoma while loading a car of pipe for my employer, B. Radinsky & Son. This claim is for damages against the Penn. Salt Co. and or any other agency or in-

(Testimony of A. L. Maslan.)

insurance Co. that might be involved. You are hereby authorized to allow the said Maslan & Maslan or their agents to discuss this case with you and to check your files in my behalf." [248]

The Court: What is the difference in form and content of the letter you last read from Plaintiff's Exhibit 25? What is the difference between Plaintiff's Exhibit 25 now in evidence?

Mr. Ben Maslan: This one, Your Honor, has Haynes' signature attached to it. That one has the signature of A. L. Maslan. It is true that in the record Mr. Haynes testified that he hired and retained Maslan & Maslan, A. L. Maslan.

The Court: Court is recessed until 2:00 o'clock this afternoon.

(At 12:40 o'clock p.m., Wednesday, November 23, 1949, proceedings recessed until 2:00 o'clock p.m., Wednesday, November 23, 1949.)

Seattle, Washington; November 23, 1949—  
2:00 o'Clock, P.M.

The Court: You may proceed in the case on trial.

Mr. A. L. Maslan: May it please Your Honor, I believe I was on the witness stand, but prior to that time there is an exhibit which has been agreed upon by [249] counsel.

The Court: Exhibit 25 has been admitted. Exhibit 26 does contain a reference to insurance. I thought counsel were withdrawing from 24 the so called election by the signature of the plaintiff, and this is the first time I personally have inspected

this particular thing which has been admitted as Plaintiff's Exhibit 25. I thought what you were going to have marked as Exhibit 25 was the paper signed by the plaintiff.

Mr. Ben Maslan: That is the one counsel agrees can go in.

The Court: It has already been put in evidence. You see no objection to that on the ground of reference to insurance?

Mr. Ben Maslan: "This claim is for damages against the Penn. Salt Co. and/or any other agency or insurance co. that might be involved."

The Court: That is what I had in mind.

Mr. Ben Maslan: I would suggest this in connection with that, that Mr. Maslan be allowed to read that letter into the record, leaving out that particular sentence.

The Court: It is not in evidence yet, is it?

Mr. Preston: We object to it entirely on the ground it is immaterial and irrelevant and for the [250] further reason that it contains extraneous prejudicial matters.

Mr. Starin: It is hearsay as far as we are concerned, Your Honor.

The Court: Any word used by this plaintiff in his transactions with the State Department concerning his proceeding or not proceeding under the Workmen's Compensation Act, so far as the words spoken are concerned, would be hearsay as to your client, no question about that, but in my opinion that will not keep the plaintiff from introducing



evidence of his acts, if any, which he did respecting that matter, if they are pertinent to the issues in this case.

Mr. Starin: The only pertinent issue here is the notice of election.

The Court: I understand that is what counsel for the plaintiff are trying to address their efforts to right now.

Mr. Ben Maslan: Yes, Your Honor. We urge it is admissible but if there is a question about that line in there—we do not think it is prejudicial, but if Court or counsel feel that, I think we can read it into the record without it.

Mr. Preston: We don't think it is material, in any event. The election, the notice of election is in [251] the letter previously admitted. It is No. 25, I believe.

The Court: Do counsel for plaintiff understand written data to be in effect as defendant's counsel just stated, that the direct election is in the letter written by counsel for the plaintiff?

Mr. Ben Maslan: Not necessarily. Very frankly, I think the election is shown by all these various documents, unless counsel agrees that there has been an election, then we don't need any of this.

The Court: You mean unless counsel for defendant disputes or denies the fact that there has been an election as required by law before the suit was brought is that what you mean?

Mr. Ben Maslan: Something like that, Your Honor. There is a 149 Washington Decision on

that. There are two decisions which I would like to bring to Your Honor's attention. One is a Federal decision which refers to the election on the Harbor Workers' Act and cites this Washington case. I would like to bring it to your attention, if I may.

Mr. Preston: Your Honor, I think we could save time. I don't think counsel will go along with us but we are willing to concede Exhibit 25 constitutes an election as of that date. I can't see where anything [252] else has any materiality. I don't know whether counsel wants to labor the point beyond that or not.

The Court: I assume counsel wants to belabor it to the extent necessary to get by the requirement that he prove and establish over objection, if necessary, and sufficient to stand up under any review by an appellate court, that the plaintiff at the proper time made an election and by doing so lawfully pursued his present remedies asserted in this case. I assume that is what counsel is proposing to do, unless you are willing to admit plaintiff made a lawful election necessary to enable him to proceed with and maintain this action.

Mr. Starin: I think, Your Honor, we can concede that an election was made by the letter that is in evidence. The date of the election appears upon the face of that exhibit. The date this action was commenced appears upon the face of this exhibit. I do not think we should be put in the position of conceding that it was lawful. That is a conclusion.

The Court: I do not think you should be put in the position against your consent of agreeing to anything.

Mr. Preston: I think we have stated the extent to which we are willing to agree, that Exhibit 25, [253] which states the date and the fact of election, is sufficient to prove that election. Anything else is immaterial. We will concede that letter constitutes an election.

The Court: If you notwithstanding such concession argue that it was not a lawful election necessary to enable the plaintiff to maintain this action, then the case is not finished on the question of whether a valid election was made. It will be necessary for the plaintiff to show that valid election was made as of the time necessary in law that the election be made. I understand from your admission you do not admit or concede any such thing.

Mr. Preston: No, Your Honor.

The Court: What do you want to do, if anything?

Mr. Ben Maslan: We want to show the entire course of conduct.

The Court: Then you will have to proceed.

Mr. Ben Maslan: Commencing with the time that our office was retained in connection with this election.

The Court: You will have to proceed. Let the witness take the stand. [254]

A. L. MASLAN

Direct Examination  
(Continued)

By Mr. Ben Maslan:

Mr. Ben Maslan: Should the jury be here, Your Honor?

The Court: It seems to me, we might as well try this out on voir dire and see if it is admissible.

Q. Mr. Maslan, the first occasion that any action was taken relevant to an election of remedies was what, according to your recollection and your memorandum that you have?

A. That was in the latter part of April, 1948.

Q. What happened then?

A. At which time Mr. Haynes, Sr., George Haynes, the father of the plaintiff, called me to visit him at his home, which is approximately eight blocks away from where I live. On my way home one evening, I stopped——

Q. I do not think you need go into that. What was done in connection with that, in other words, after you conferred with your client, Mr. Haynes?

A. After discussing the matter and the facts with Mr. Haynes and the boy, the present plaintiff, I advised him that in my opinion he had a cause of action against the Pennsylvania Salt Manufacturing Company and to that end I [255] obtained from him a letter dated April 26, 1948, addressed to the Department of Labor and Industries at Olympia, Washington.

(Testimony of A. L. Maslan.)

Q. Is that the same letter that is attached to this exhibit marked Plaintiff's Exhibit 26? Would the bailiff show that to the witness?

A. I have a copy in my file. That is the letter.

Q. What did you do with the letter? That was signed by Oscar Haynes, the plaintiff, and witnessed by his father on April 26, 1948? What did you do with that letter?

A. I retained the letter for several days in my file and then on May 4, 1948, I addressed a letter to the Department of Labor and Industries, Olympia, Washington, and attached the letter signed by Oscar Haynes and witnessed by his father, George Haynes, to the letter dated May 4, 1948, addressed by me to the Department of Labor. You are now referring to Exhibit 26?

Q. Exhibit 26 for identification, of course, it has not yet been admitted. I think that letter has been read to Your Honor.

The Court: Let me see it. The April 26th letter is the one that has the reference to the insurance company in it, signed by Oscar Haynes, April 26, 1948, addressed to the Department of Labor and Industries. That is a part of Plaintiff's Exhibit 26 for [256] identification.

Mr. Ben Maslan: That is correct, Your Honor.

The Court: It seems to me that if there is a definite statement to the Department subsequent to May 4th that there is no materiality about May 4th. There is no necessity for introducing the ne-

(Testimony of A. L. Maslan.)

gotiations if the negotiations were accomplished by final position. Let me see Plaintiff's Exhibit 25. You have not shown any right yet, in my opinion, to introduce the preliminary leading up to that. That seems to be the accomplished fact. Exhibit 25 bears date of the 8th of June, does it not? Referring now to Plaintiff's 26, is there objection to that?

Mr. Preston: Yes.

The Court: The objection will be sustained.

Mr. Ben Maslan: Note an exception to that, Your Honor.

The Court: Allowed.

Mr. Ben Maslan: We sincerely feel that it is part of the record of election.

Q. What further was done subsequent to the letter of June 8th, after Exhibit 25 was sent?

A. Subsequent to that time, the Department in a letter advised me——

The Court: Unless the letter is in, if there is [257] any objection to it, you are not entitled to say what the contents are.

Q. Do you have such a letter from the defendant? A. Yes.

Q. Could I look at that?

The Court: Let the clerk mark it as Exhibit 27.

The Witness: On June 1—on May 14, a letter was received by me—will you mark that, and I will read it.

The Court: You cannot read the contents of something that is not in.



(Testimony of A. L. Maslan.)

(5-14-48 Letter marked Plaintiff's Exhibit 27 for identification.)

The Court: To what subject does Plaintiff's Exhibit 27 relate?

Mr. Ben Maslan: Could I see Plaintiff's Exhibit 25? This letter of June 8 refers to that letter from the Department dated May 14th and encloses the check that they mention as the necessary amount to reimburse the Department.

The Court: You may inquire of the witness touching its qualifications. You might ask the witness concerning the subject matter of your statement.

Q. What did you do relative to the request of the [258] Department containing the letter of May 14th which has been marked for identification as Exhibit 27?

A. Has Your Honor read that letter?

The Court: I know something of the contents of that.

The Witness: Then in answer to the letter of May 14th——

Mr. Preston: Your Honor, we could concede, it has been so testified that the amounts required by the defendant were paid back.

The Court: Such a concession does not necessarily deprive the party of the right to have the evidence on which the concession is made introduced in evidence before the Court and jury. If counsel

(Testimony of A. L. Maslan.)

is satisfied to rest the matter upon your concession, the Court would think that would be a splendid thing to do but the Court knows of no way of requiring counsel to do so.

Mr. Ben Maslan: The point is, there is not a complete admission. In view of that fact, we have to go into the details of this.

The Court: What is there before the Court respecting Exhibit 27?

Mr. Ben Maslan: I offer that in evidence as a letter received from us by the Department of Labor and [259] Industries.

The Court: What is the attitude of opposing counsel regarding this offer?

Mr. Preston: That is objected to as immaterial and irrelevant, hasn't any bearing upon any issue in this case.

The Court: I ask the witness to let the Court know what he understands the nature of the letter to be, what subject matter is discussed?

The Witness: In that letter, may it please Your Honor, of May 14th, which is Plaintiff's Exhibit 27, it states that they——

The Court: Just say what the subject is.

The Witness: They acknowledge the receipt of my letter of May 4th, Your Honor, and they stated that if an action is to be brought they must insist that any payments that have heretofore been made by the defendant in behalf of Oscar Haynes be refunded by Oscar Haynes to the Department, and they ask for a total of \$267.50, for two payments at

(Testimony of A. L. Maslan.)

\$75. per month or \$150., and \$112. covering payments out of the Medical Aid Fund made by them.

The Court: Will you look at Plaintiff's Exhibit 25?

The Witness: Yes, Your Honor. On Plaintiff's [260] Exhibit 25, there is a letter dated June 8, 1948, sent by me personally to the Department of Labor wherein I stated that "We are preparing summons and complaint in this action and will forward a copy to you within the next few days." I further stated that the check in the sum of \$267.50 requested by the Department will also be sent, and then I further stated that "This letter confirms our previous letter to you wherein the above Oscar Haynes hereby elects to prosecute his claim for damages . . ."

The Court: That has no bearing on this other letter. You may inquire further. Is there anything else which was done? Is there any written evidence of doing what was promised to be done in regard to these payments?

Q. Did you ever send those checks back, the money back?

A. Yes, I did. Then subsequently——

Q. Did you enclose a check with Exhibit 25?

A. No, I didn't. I did that on a different date, counsel. On July 20th I sent——

The Court: Is there a communication or a copy of a communication on that date concerning this matter to which you wish to refer?

(Testimony of A. L. Maslan.)

Mr. Ben Maslan: Yes, Your Honor. [261]

The Court: Let it be marked Plaintiff's Exhibit 28.

(7-20-48 Letter marked Plaintiff's Exhibit 28 for identification.)

Q. What is this letter of July 20th?

A. That is a letter in which I enclosed our check in the sum of \$192.50, plus the State of Washington check No. 459621, dated May 4, 1948, in the sum of \$75., which had been uncashed by Oscar Haynes. I further stated in the letter——

The Court: Never mind what you stated in the letter. About what subject did you write, if anything?

The Witness: That was in answer to the demand of the Department of Labor for the sum of \$267.50.

The Court: Is it a fact, as I understand your statement, that this letter of July 20th, 1948, was a letter transmitting the payments mentioned in the Department's letter to you dated May 14, 1948.

The Witness: Yes, Your Honor.

Mr. Ben Maslan: I offer that letter in evidence.

Mr. Preston: No objection.

The Court: That letter is now admitted. [262]

(Plaintiff's Exhibit 28 received in evidence.)

Mr. Ben Maslan: Will you please have this check marked?

(Testimony of A. L. Maslan.)

(Check marked Plaintiff's Exhibit 29 for identification.)

Q. What is Exhibit 29?

A. That is a check that I received back from the Department of Labor, together with a letter from the Department of Labor.

Q. That was your check originally?

A. That was my original check of \$192.00.

The Court: Sent with what letter?

The Witness: That was sent with the letter dated July 20th.

The Court: In evidence as Plaintiff's Exhibit 28?

The Witness: Yes, Your Honor. This Exhibit 29, may it please Your Honor, is the check dated July 20th which was enclosed in the letter dated July 20th marked Exhibit No. 28, in the sum of \$192.50.

Q. Why was that sent back to you?

A. It was sent back to me for the reason that the Department of Labor had checked the amount and had found [263] that I had overpaid them and they wanted a lesser amount. When I say overpaid them, may I explain that, Your Honor?

The Court: You may.

The Witness: By that, there was an error in figuring, and they had calculated that they had paid some five or six dollars more than they actually had paid, and they had sent me the check of \$192.50 back

(Testimony of A. L. Maslan.)

and demanded from me in lieu thereof a check in the sum of \$187.50.

Q. What date was the letter you got from the Department?

A. I am looking for that letter. The original is in the file. You have the original there, counsel.

Q. Do you find the original letter from the Department dated August 17, 1948?

A. That is what I am looking for.

The Court: The check dated July 20, 1948, has been marked Plaintiff's Exhibit 29.

Mr. Ben Maslan: I offer that in evidence, Your Honor.

The Witness: It was enclosed with that letter.

The Court: The letter has not been marked. Do you wish this letter attached to Exhibit 29?

Mr. Ben Maslan: Yes, I think they should be attached together and I will offer them in evidence as one exhibit.

The Court: Let it be attached. The offer is made of Plaintiff's Exhibit 29, consisting of this letter and the check which it purports to have returned to the witness. That exhibit, consisting of those two parts, is now admitted.

(Plaintiff's Exhibit 29 received in evidence.)

The Witness: May I advise Your Honor of the contents thereof?

The Court: Yes, you may.

The Witness: The contents of that letter, dated



(Testimony of A. L. Maslan.)

August 17th, refers to the Oscar Haynes case and states, "Enclosed is your check in the amount of \$192.50, intended as a refund of certain payments made in connection with this claim.

"We find upon review of the file that the correct amount should have been \$187.50. Therefore, will you kindly forward the latter sum pending action against the third party."

It is signed by the Department of Labor and Industries, M. P. Gilbert, Assistant Claim Agent.

Q. Subsequent to that, did you send them the correct [265] amount, and if you did, was it contained in any letter or communication?

A. It was a letter subsequently sent by me to the Department, dated September 16, 1948, in which I enclosed the sum requested by the Department in the sum of \$187.50.

The Court: Do you have that letter or a copy of it?

The Witness: I have a copy.

Mr. Ben Maslan: We have the original.

The Court: Let one of them be marked.

The Witness: It is a letter dated September 16th.

Mr. Ben Maslan: It has a copy of the complaint attached to it. If we attached the check to Plaintiff's Exhibit 24——

The Court: Plaintiff's Exhibit 24 has been diminished in size and number of papers so that at this time it consists of a letter purporting to bear

(Testimony of A. L. Maslan.)

date September 16, 1948, written by Maslan & Maslan, addressed to the Department of Labor and Industries at Olympia, to which is attached a purported copy of the complaint.

Mr. Ben Maslan: Also, we are attaching the check to it.

The Court: Let that check be attached to it. Let opposing counsel see its present form. Have you offered it? I do not know whether there has been any [266] proof relating to it or not.

The Witness: I sent that letter of September 16, enclosing the copy of the summons and complaint which had heretofore been requested by the defendant, together with the check in the sum of \$187.50 which they had heretofore requested, and the enclosures and the letter marked Plaintiff's Exhibit 24 and those were enclosed by me and subsequently received by the Department and taken from their file.

Mr. Starin: We have only this question concerning it. We are not familiar with it. The Court does submit pleadings to the jury. If it isn't the practice to submit pleadings to the jury, then the jury would have this in this form.

The Court: In my opinion, the plaintiff is entitled to show all the acts materially bearing upon plaintiff's claimed election, and I do not think that your point made in connection with the nature of that writing will sufficiently prevent the plaintiff

(Testimony of A. L. Maslan.)

from enjoying its right to have evidence of its act in that connection adduced in evidence.

Mr. Preston: If Your Honor please, as you will note from this letter, this has nothing to do with an election. This recites the fact that an action has already been started and sends them a copy of the [267] summons and complaint.

The Court: Do counsel wish that summons and complaint there?

Mr. Ben Maslan: No, Your Honor. We had just as well withdraw the complaint in view of counsel's objection.

The Court: Mr. Clerk, would you eliminate from that exhibit that large paper entitled "Complaint" and return it to counsel who produced it, and then keep the two remaining papers or objects together.

Mr. Ben Maslan: With the complaint deleted, we move the admission of that exhibit.

The Court: Consisting of what?

Mr. Ben Maslan: Consisting of the letter of September 16 and the check of \$187.50.

Mr. Preston: We think it is immaterial, if the Court please.

The Court: The objection is overruled and this exhibit consisting of those two parts last mentioned by counsel is now admitted.

(Plaintiff's Exhibit 24 received in evidence.)

Mr. Ben Maslan: Is there anything else, Mr. Maslan? I think with the exception of the letter of

(Testimony of A. L. Maslan.)

May 5th, which includes the letter of April 26th, which is Exhibit—— [268]

The Court: The letter of May 4th and the letter of April 26th are bound together as one exhibit, namely, Plaintiff's Exhibit 26 and the letter of April 26 has in it that statement about insurance. Are you offering that exhibit now?

Mr. Ben Maslan: Yes, Your Honor.

The Court: If counsel can assist the Court in excluding from the jury's attention those words relating to insurance, I think the remainder of it is admissible. As a matter of fact, it is all admissible but by reason of the unnecessary prejudice to the defendant's interests in this case of those words referring to insurance, they must be covered up and deleted in some manner. Either they must be cut out or else they must have a piece of paper pasted over them, and if they are eliminated from it, the trial proceedings in the absence of the jury should show that they are eliminated.

Mr. Starin: That matter has been submitted and the Court has sustained our objection to it.

The Court: I have previously, but the matter is presented in a different light now. I believe the additional circumstance just mentioned further authenticates and establishes admissibility for Plaintiff's Exhibit 26. [269]

Mr. Ben Maslan: I might state this, that we do not say there is an insurance company. This is what we say in this letter, "This claim is for damages

(Testimony of A. L. Maslan.)

against the Penn. Salt Co. and/or any other agency or insurance Co. that might be involved." We do not know. We are not making any claim to that effect, Your Honor.

The Court: In view of the objection to the admission, the Court is going to eliminate every possible obstacle. The record of proceedings in the absence of the jury can show what those words are, but those words in my opinion need not go to the jury because of the risk of doing greater harm to the defendant than the presence of those words before the jury would do in favor of the plaintiff's case.

Mr. Ben Maslan: As a matter of fact, Your Honor, we sincerely feel that this whole question of election is a question of law for the Court, in view of its present status, the extent to which it has come.

The Court: If you wish to submit it as such, there is no harm done. If you intend to not ask that the jury look at those papers, then the Court will rule.

Mr. Ben Maslan: We feel that the Court should instruct the jury as a matter of law that an election has been made pursuant to law and that they should disregard the Workmen's Compensation Act.

The Court: The possibility of your taking such a position was one reason that caused the Court to have these proceedings in the absence of the jury.

(Testimony of A. L. Maslan.)

Mr. Ben Maslan: That is our position, Your Honor.

The Court: Plaintiff's Exhibit 26 is now admitted as to each and both of its parts, and I direct in that connection that this exhibit be not submitted to the jury unless and until further arrangements be made in that connection concerning those words, that in any and all events the exhibit with those words on the exhibit be not submitted to the jury. If the exhibit goes before the jury, the Court requires counsel and the clerk to assist the trial judge in excluding those words from the attention of the jury.

(Plaintiff's Exhibit 26 received in evidence.)

The Court: We have Plaintiff's Exhibit 27 not yet disposed of. It is the letter of May 14th.

Mr. A. L. Maslan: May I return to the stand?

The Court: You may do so. [271]

Direct Examination

(Continued)

By Mr. Ben Maslan:

Q. Will you look at the exhibit? What is the exhibit number?

A. It is a letter from the Department, May 14, wherein they state that they are sending the record to the Seattle office and insisting, however, that if an action is to be brought the amounts in the sum of \$267.50 are to be returned back to the Department of Labor by the prospective plaintiff.



(Testimony of A. L. Maslan.)

Mr. Ben Maslan: We offer that exhibit in evidence, Your Honor.

Mr. Preston: Same objection, immaterial.

The Court: The objection is overruled. That exhibit is now admitted.

(Plaintiff's Exhibit 27 received in evidence.)

Q. Subsequent to the commencement of this action, did you have any communications from the Department of Labor and Industries showing acquiescence or any other action in connection with the action taken by Mr. Haynes in this suit?

Mr. Preston: That would be immaterial, whether the Department acquiesced or otherwise. [272]

The Court: The objection is overruled.

The Witness: I received a letter, which is now being marked as an exhibit.

(2-15-49 Letter marked Plaintiff's Exhibit 30 for identification.)

Mr. Ben Maslan: We offer that in evidence.

Mr. Preston: That exhibit has no bearing here. It is a letter, the first of this year, from the State asking how the case is coming along. What that has to do with election or anything else, I can't imagine.

The Court: Does it say anything about accepting those check payments? Does it have anything to do with adopting or accepting or acceding to the course taken by the plaintiff?

Mr. Ben Maslan: It refers, Your Honor, spe-

(Testimony of A. L. Maslan.)

cifically to the letter of September 16, which told the Department that suit had been commenced against the third party, Pennsylvania Salt Manufacturing Company, and it does not show any objection or anything other than the acquiescence, and I think in that regard it is admissible.

Q. By the way, that check was cashed, was it not?      A. Yes. [273]

The Court: The check which is part of Plaintiff's Exhibit 24 is the one you refer to, is it?

Mr. Ben Maslan: Yes, Your Honor, the check dated September 16th or thereabouts.

The Witness: In the sum of \$187.50.

The Court: Look at the check and answer the question, will you?

The Witness: That check was cashed by the Department of Labor and Industries on October 18, 1948.

The Court: Does it bear any other indorsements indicating any other official dealing with it?

The Witness: Yes, Your Honor. It bears the following bank indorsement, "Pay Seattle First National Bank, Olympia Branch, or Order by Russell H. Fluent, State Treasurer of Washington" and it was marked indorsed above that, Department of Labor and Industries. These indorsements appear on the reverse side of said check.

The Court: Do you know what became of the money collected on that check? Will you look at the last indorsement particularly?

(Testimony of A. L. Maslan.)

The Witness: There was an indorsement dated October 18, 1948. It went through the Seattle First National Bank.

Q. Actually, it was cashed and went into the State [274] Treasury by those indorsements?

A. Yes, because the sum of \$187.50 was deducted from our bank account.

Q. By virtue of those indorsements, the State Treasury is the one that cashed that?

A. It was indorsed by Russell H. Fluent, State Treasurer.

The Court: The Court is ready to rule upon Plaintiff's Exhibit 30. Would counsel for defendant state their attitude?

Mr. Preston: We objected to it on the ground it was irrelevant and incompetent.

The Court: The Court thinks it is admissible as being an act by the State Department indicating receipt by that Department of the last communication of the plaintiff, from the plaintiff's counsel which is in evidence as Plaintiff's Exhibit 24.

Mr. Ben Maslan: This language in *Harvey vs. McCormick Lumber Co.*, 149 Wash 368——

The Court: Does it touch upon admissibility?

Mr. Ben Maslan: It touches upon the question of apparent acquiescence in return of money.

The Court: You may read it very briefly.

Mr. Ben Maslan: In *Harvey vs. McCormick Lumber Co.*, 149 Wash 368, at 374: [275]

"... he notified the department of his intention

(Testimony of A. L. Maslan.)

so to do, and made complete restitution to the state of the moneys he had already received, all with the apparent acquiescence and consent of the department." That fits exactly the situation.

The Court: In that case, did the Court hold that the election was sufficiently accomplished by those actions?

Mr. Ben Maslan: Yes, Your Honor.

The Court: The Court is ready to rule. The objection is overruled. Plaintiff's Exhibit 30 is now admitted.

(Plaintiff's Exhibit 30 received in evidence.)

The Witness: I believe His Honor asked me a question in relation to the cashing of this check. I know it was cashed and the said sum was deducted from our bank account.

The Court: I wondered if he could tell by considering the check in its present form, all indorsements thereon, who got the money?

The Witness: Yes, the Treasurer, State of Washington, through the Department of Labor and Industries. [276]

Q. Are there any other communications from yourself to the State following that?

A. Yes. In answer to that letter, which was dated February 15, 1949, which I received either on the 16th or 17th, I sent back a letter to the Department.

Q. Under what date?

(Testimony of A. L. Maslan.)

A. February 17, 1949.

Q. Do you have a copy of it there?

A. I have our office copy.

Q. Could I see that please?

(2-17-48 Letter marked Plaintiff's Exhibit 31 for identification.)

Mr. Ben Maslan: I offer that letter in evidence.

Mr. Preston: It is objected to as immaterial, incompetent, irrelevant, nothing to do with election or anything else in the case.

Mr. Ben Maslan: It shows a continued acquiescence by the State of Washington in the prosecution of the present suit against the Penn. Salt Company.

The Court: Are you going to offer any other letter subsequent to that? Is that the last one?

The Witness: There is one more, Your Honor.

Mr. Preston: What would be the materiality of whether the State agreed or not? [277]

The Court: May I see the other one?

The Witness: That is another request for what is happening, and the answer. That shows the trial was set September 9, 1949.

The Court: Bind these two together and mark them Plaintiff's Exhibit 32.

(7-12-49 Letter marked Plaintiff's Exhibit 32 for identification.)

The Court: Let opposing counsel see them, and also 31.

(Testimony of A. L. Maslan.)

Mr. Preston: I can't see any materiality, if the Court please.

Mr. Ben Maslan: We offer Exhibit 31 for identification and Exhibit 32 for identification.

Mr. Preston: May I continue my objection, please? I know of no requirement the State has to acquiesce in these actions, so how would the continued correspondence back and forth between counsel and the State, advising when the case might be set or when it is expected it will be on the calendar and so forth, how that could have any materiality at all, I don't know.

The Court: It negates the possibility that the Department did not acquiesce in the attempts to revoke [278] the previous actions of the plaintiff, accepting one or more checks, paying him compensation under the Workmen's Compensation Act. It does have, in my opinion, such effect. The objection is overruled and Plaintiff's Exhibits 31 and 32 are admitted.

(Plaintiff's Exhibits 31 and 32 received in evidence.)

The Witness: May I advise Your Honor what they are?

The Court: You may.

The Witness: Exhibit 31 was the answer to Exhibit 30, I believe, which was a letter dated February 15th wherein they ask what the progress of the trial was, and I advised them that in all pos-



(Testimony of A. L. Maslan.)

sibility it will be set on February 23rd for some time in May or June of 1949.

Exhibit 32 is the further request for information from the Department of Labor in a letter dated July 12, 1949, asking us the present status of the Oscar Haynes case, Claim No. B-575312. The letter was dated July 12th and the answer was dated July 14th, wherein I stated *I stated* in the said answer that the above entitled matter—referring to the case of Oscar Haynes vs. Pennsylvania Salt Company—has been set [279] for trial September 9, 1949, before the Federal Court.

The Court: Is this all the evidence you wish to offer on the question of election?

Mr. Ben Maslan: By the way, just for the record, the case was continued from the September date mentioned until the present date.

The Court: You may step down.

Mr. Preston: No questions.

(Witness excused.)

Mr. Ben Maslan: Oscar Haynes, please.

The Court: The witness has already been sworn and will now resume the stand for further interrogation. Try to complete all of the interrogation of this witness at this time.

## OSCAR VIRGIL HAYNES

recalled as a witness, having been previously duly sworn, was examined and testified as follows:

## Direct Examination

By Mr. Ben Maslan:

Q. Prior to this time that you consulted your attorney, Mr. A. L. Maslan of our firm, did you have any knowledge that you might have a possible claim of suit [280] against the Pennsylvania Salt Company?      A. No, sir.

Q. When did you first learn that you had such a possibility of suit?

Mr. Preston: This is all repetition, if the Court please.

Mr. Ben Maslan: I do not know whether that came in or not.

Mr. Preston: It was all gone over time and time again.

The Court: Read the question.

(Last question read by reporter.)

Mr. Ben Maslan: Against the Pennsylvania Salt Manufacturing Company.

The Court: I am going to permit him to answer it, being in the absence of the jury and the possibility that the Court may be called upon to rule as a matter of law upon the question of whether or not election was made before this action was brought.

The Witness: That was in the latter part of April.

(Testimony of Oscar Virgil Haynes.)

Q. When you consulted your attorney, Mr. Maslam? A. Yes, sir.

Mr. Ben Maslan: You may cross-examine.

Mr. Preston: No questions. [281]

The Court: Step down.

(Witness excused.)

The Court: Is there any other evidence on the question of election?

Mr. Ben Maslan: May I ask him just one question from here?

The Court: You may do so.

Mr. Ben Maslan: Did you ever assign your cause of action against the Pennsylvania Salt Manufacturing Company to the Department or to anyone else?

The Witness: No, sir.

The Court: What do you wish to say, if anything, in the absence of the jury with respect to this testimony that has been received on the question of election?

Mr. Ben Maslan: Your Honor, frankly yesterday we had anticipated that the mere fact that we had brought the action and were pursuing it, shall I say, relentlessly or with some vigor was proof enough of election. However, the question was raised. The defendants never raised the question in their answer; however, the Court on its own motion made the suggestion as to that question and in view of that we proceeded with this testimony today. Now, we sincerely feel that the plaintiff

has solely elected to bring himself [282] within the election in favor of this suit against this company.

The Court: What is the allegation in the complaint on that point, if any?

Mr. Ben Maslan: We do not know that any allegation is necessary. If it is, the allegation is included by reason of the testimony that has been introduced. Actually, we feel that it is a matter of defense, if at all.

The Court: There have been a lot of objections to the testimony that has been offered.

Mr. Ben Maslan: There is no objection that there was no pleading. There was direct testimony without objection made by the parties as to the election. This matter came up on cross-examination. It started the question of all these letters and documents and so forth, as Your Honor will recall, which came up on cross-examination of the witness, Oscar Haynes, by the defendant company. But the matter of election, Oscar Haynes' direct testimony was admitted without objection, as I recall.

“\* \* \* Provided, however, that if the injury to a workman is due to the negligence or wrong of another not in the same employ, the injured workman, or if death result from the injury, his widow, children, or dependents, as the case may be, shall elect whether to take under this Act or seek a remedy against such other, such election to be in advance of any suit under this Section; \* \* \*”

Of course, we have the letter of June corroborating the letter of May to the effect that, as stated

in the letter of May, "We elect to bring action against the third party, the Pennsylvania Salt Manufacturing Company," and suit was brought sometime in September or thereabouts, the filing date of the suit.

The Court: The filing date, September 15, 1948?

Mr. Ben Maslan: Yes, Your Honor. So the actual election, which even counsel stated, was an election on that date of June 8th, was some two months, more than two months prior to the date of the suit.

"\* \* \* and if he take under this Act, the cause of action against such other shall be assigned to the state for the benefit of the accident fund; \* \* \*"  
In other words, if he is going to go ahead under the Workmen's Compensation Act, it says it is mandatory the cause of action shall be assigned to the Department, which was never done. That would be the election the other way. As a matter of fact, the plaintiff testified positively that he never made any [284] such assignment.

Later on, it says, "Any such cause of action assigned to the state may be prosecuted, or compromised by the Department, in its discretion." So there being no assignment, there is no procedure against the Department, there is no election against the Department.

The Court: Do you ask the Court as a matter of law to so instruct the jury, that there was election before the suit was filed?

Mr. Ben Maslan: Yes, Your Honor.

The Court: Is there anything else you wish to say?

Mr. Ben Maslan: I think the law is pointed out in *Harvey vs. McCormick Lumber Co.* That case was not ruled upon as a matter of law but the Court did lay down the rules of law applicable which I may state to Your Honor. I think there was an issue of fact as to the election. Here there is no issue of fact.

“An election to accept compensation from the state under the provisions of the Statute above quoted requires an assignment of the claim against the third party against whom such right of action exists. No such assignment was made in this case; and conceding that, where an election has actually been made, [285] assignment would follow as a matter of law, yet the state has here consented to and has held respondent's claim in abeyance and permitted him to return the money received and maintain this action in his own right. Regardless of respondent's course of conduct, the cause of action here litigated belonged either to respondent or to the state. Appellant was and is answerable either to respondent or to the state. In this particular, our Industrial Insurance Act differs from some we have examined. There can be no election under our law without an assignment, either actual or by operation of law, of the cause of action.”

Then I would like to read another portion of the decision, if Your Honor please.

“Respondent, after making claim for compensa-



tion, received certain moneys from the state. The testimony clearly indicates, however, that, at the time of the receipt of the money, he had no knowledge of his right to pursue any other remedy. He did not comply with that condition of the Statute relative to assigning his claim to the state. Promptly upon learning of his right to sue the appellant, he notified the Department of his intention to do so, and made complete restitution to the state of the moneys he had already received, all with the apparent acquiescence and consent [286] of the department. The question then remains, can a man be said to have elected between two inconsistent remedies if he does not know of the existence of both?" Clearly there is no evidence here, there is no cross-examination of the witness to show that he did know of anything. There is no evidence at all to show that he knew of having any other remedies.

The Court: I will hear from the opposing side.

Mr. Preston: I am not quite sure what question is before the Court.

The Court: I understood the plaintiff has asked that this question, if it ever was one, be withdrawn from the jury and the jury be instructed in connection with the general instructions on final submission of the case to the jury that the plaintiff did elect to sue this defendant in a third party suit instead of proceeding under the Workman's Compensation Act.

Mr. Preston: In other words, whether the Court should rule——

The Court: As a matter of law.

Mr. Preston: —as a matter of law that the election has been made prior to the beginning of the action. May we consider that? This evidence went in without any idea we received as to what its purpose was. [287]

The Court: I want to say to both of you that tentatively the Court inclines to favor granting this request for the Court's ruling on that question as a matter of law and not to submit the question whether or not an election was made for the jury to decide.

Mr. Preston: The Court may be justified, but I would like to consider it.

The Court: I have not announced the Court's decision. I have tried to advise counsel of the trend of the Court's thinking at this time. I am going to excuse all those connected with this case for at least ten minutes. After the Court has a recess, I expect to bring in the jury and proceed in the trial of this case.

For the time being, the Court directs Exhibits 24-32 inclusive be not submitted to the jury but be kept as part of the record made in this case in the absence of the jury.

(Recess.)

The Court: Let the record show all of the jurors are present as before and that all parties on trial with their counsel are present. Call the next witness.

Mr. A. L. Maslan: May it please Your Honor, there is an item of evidence that has been admitted by both counsel, in relation to a doctor's bill in the sum of [288] \$97.00 from Dr. Cameron.

The Court: Do you mean as to that counsel are agreed it may be offered and received in evidence?

Mr. A. L. Maslan: Yes, Your Honor.

Mr. Preston: That is right.

(Doctor's statement marked Plaintiff's Exhibit 33 for identification.)

Mr. Ben Maslan: Just for the record, perhaps I might read that.

The Court: Upon the stipulation stated, the Court does now admit Plaintiff's Exhibit 33 in evidence and you may read it at this time, if you wish.

(Plaintiff's Exhibit 33 received in evidence.)

Mr. A. L. Maslan: This is a statement of Drs. Cameron and Hillis of Tacoma, Washington, for professional services, February, March and April, 1948, in the sum of \$97.50. I don't think there is any question about this being reasonable.

Mr. Ben Maslan: With the exception of the legal matter that we discussed, the plaintiff now rests.

The Court: The plaintiff rests. The defendant may now proceed. If the defendant wishes to make an opening statement, it will now have that opportunity.

Mr. Preston: Your Honor, the defendant will waive an opening statement. I might say to the

Court and counsel our evidence will consist of an offer of proof of various matters which should, by reason of Your Honor's previous ruling, be made in the absence of the jury, so I might suggest that the jury be excused.

The Court: What will be the defendant's further wishes after that?

Mr. Preston: After that the defendant will rest.

The Court: In view of that fact, will there be any rebuttal?

Mr. Ben Maslan: No, Your Honor.

The Court: Is there something you wish to ask, Mr. Bothell?

Juror No. 12: Could I ask a question, Your Honor? Your Honor, there is some jurors here, before this case is turned over to us for our deliberation, who would like to see the plaintiff for a closer examination. I hesitate to ask about it because I didn't know.

The Court: I will say this to the jurors; I will instruct you now the responsibility rests on counsel and the Court in furnishing the jury with all [290] the evidence necessary for them to have in order to make a decision of the case, and I suggest to the jurors that you may content yourself with your reliance upon the fact that counsel in this case present all of the necessary proof in the case which they are advised of in order to enable the jury to be properly advised of the facts.

Mr. Ben Maslan: We would be very pleased to have the plaintiff appear at this time in front of

the jurors for closer inspection. I had intended during my argument to the jury to bring him forward. I do not know whether that is proper or not.

The Court: That is not proper. If there is any evidence to be produced, you should produce it.

Mr. Ben Maslan: At this time I move to reopen just for that purpose, to have the plaintiff appear in front of the jury for their close inspection. I would appreciate that, Your Honor.

The Court: Is there any objection?

Mr. Preston: No.

The Court: That request is granted and the case is opened up for that purpose. No words need be spoken. Just give the jury an opportunity to see the plaintiff. Is there anything else that anyone wishes in this connection? Does the plaintiff rest?

Mr. Ben Maslan: Yes, Your Honor.

The Court: Does the defendant rest, subject to this condition that you mentioned?

Mr. Preston: Subject to the condition I made.

The Court: I wish all members of the jury to carefully remember and heed the Court's previous admonitions against gathering any information about this case in any way other than that which the Court instructs you, namely, while you are present in the Courtroom in open Court in the presence of the Court and the parties and their counsel, and under no other circumstances, and remember all the details of the admonitions and heed them at all times. The jury is excused until

Friday morning at 9:30 o'clock. You may now retire.

(Jury retires.)

The Court: Does the plaintiff wish to show anything or does the defendant wish to show anything respecting plaintiff's motion or request that the Court rule as a matter of law that the plaintiff did effectually before filing this action elect to proceed under the provisions of the Workmen's Compensation Act which permits the plaintiff to elect to sue a third party not his employer on account of his injuries and damages sustained in the accident involved in this [292] action?

Mr. Ben Maslan: We renew our motion or suggestion to the effect that the Court take that question away from the consideration of the jury and rule as a matter of law that there has been such a valid election and that the jury be so instructed, and that they be instructed to disregard all reference to the Workmen's Compensation Law.

The Court: Is there anything else to be said by defendant?

Mr. Preston: We have nothing further to say on it, Your Honor.

The Court: The Court grants the motion and request and will so instruct the jury.

The defendant may make its offer of proof as part of its case-in-chief as previously mentioned.

Mr. Starin: The offer of proof, if the Court please, concerns the matter which is the subject of the legal argument in the session last evening upon



which the Court has indicated its ruling. For the record, the defendant offers to prove by the testimony of Jack Radinsky that he is a member of the firm which employed the plaintiff, Oscar V. Haynes; at the time of the accident and at all times prior thereto while in the employ of B. Radinsky & Son the plaintiff was a workman [293] engaged in extra hazardous employment; that at the time of the accident and for a long period of time prior thereto plaintiff was employed as a truck driver handling heavy loads of scrap metals and other materials; that said employment was classified as extra hazardous under the Workman's Compensation Act of the State of Washington; that B. Radinsky & Son at all times prior to February 20, 1948, reported to the Department of Labor and Industries of the State of Washington that the plaintiff was employed by them in extra hazardous employment; and at all times B. Radinsky & Son, the employer of the plaintiff, paid all contributions required to be paid by it to the Industrial Insurance Fund in the State of Washington covering such extra hazardous employment of the plaintiff.

The defendant further offers to prove by the testimony of J. M. Driskell that he is the treasurer of the Pennsylvania Salt Manufacturing Company of Washington, Incorporated, the defendant in this action, and as such treasurer is in charge of all of the records relating to personnel and to the payment of contributions to the Industrial Insurance Fund of the State of Washington; that at all times

since the establishment of defendant's Tacoma plant, defendant has been engaged in extra hazardous employment; that [294] said plant at all times was operated with the use of power driven machinery and constituted a factory, mill and workshop as those terms are defined by the Statutes of the State of Washington; that all employees engaged in the operation of said plant and employed in the yard and premises adjoining the plant were classified as being engaged in extra hazardous employment as defined by the Workmen's Compensation Act of the State of Washington; that all employees of the defendant, including Edwin L. Cliffe, assistant superintendent in charge of production and plant personnel, who participated in any manner in the handling, removing, cleaning or storing of the coil of pipe alleged to have caused plaintiff's injury and who were required to perform any duties whatsoever with respect thereto, and whose actions or omissions with reference to said coil of pipe are said to have formed the basis of plaintiff's charge of negligence, were employees who were classified as extra hazardous under the Workmen's Compensation Act of the State of Washington.

That all of said employees at all times prior thereto, including and subsequent to the date of the delivery of said coil of pipe to Frank Powser, were classified under 37—1, defined by the Statutes of the State of Washington as being extra hazardous employment, [295] that at all times the defendant made contributions to the Industrial Insurance

Fund covering all of said employees, which contributions were computed according to the rates fixed for such classified employment, and at no time was defendant in default in the payment of said contributions.

That, if the Court please, is our offer of proof.

The Court: What is the attitude of the plaintiff respecting the allegations in Paragraph 2 on Page 3 of the defendant's answer and first affirmative defense, or any part of the allegations contained in that paragraph insofar as the same may be affected by this offer of proof?

Mr. Ben Maslan: Your Honor, we move to strike. We move to strike this portion of the pleading, and I believe Your Honor sustained it yesterday. I don't know whether I am phrasing it correctly, but we object to this proffered testimony as not constituting any defense to this action and being therefore incompetent, irrelevant and immaterial, redundant and so forth. Was there some other purport to your question?

The Court: About being a contributor to the fund.

Mr. Ben Maslan: That is entirely immaterial, Your Honor, if Your Honor abides by Your Honor's ruling of yesterday it is entirely immaterial as to whether [296] they were or were not a contributor. I understood that the Court will——

The Court: I heard the offer. Is there anything you have to observe in connection with your statement concerning it as to whether or not it offers

any material that is new and different from that which was considered yesterday?

Mr. Ben Maslan: I can't see any difference there, Your Honor. He offers to prove, in effect, that the plaintiff was a workman under the Industrial Insurance Law. There is no question about that. Then he offers the background proof to the effect that the company at all times was engaged in extra hazardous employment, and so forth, but nowhere does he get away from the logic of Your Honor's ruling of yesterday evening. In other words, as my associate counsel who argued the matter yesterday suggested to me, the evidence that he offers at this time by this formal offer of proof is nothing more or less than the evidence that would be introduced under these allegations of the affirmative defense if it were allowed to stand. Without such an affirmative defense such evidence is improper, it is incompetent. It isn't relevant at all to any of the issues in the case. In other words, it does not state a defense. That is the whole essence of my position. [297]

The Court: Is it your contention it does not go far enough? To prove that with respect to this particular pipe and at the time of the accident with reference to that pipe it was in the course of those extra hazardous operations?

Mr. Ben Maslan: That is correct, that it was part of the defendant's operations, and the evidence is very clear—it is admitted, as a matter of fact, by the defendants themselves that the pipe had

been discarded and abandoned some appreciable time prior to the time of the accident, which occurred on someone else's premises entirely.

The Court: The Court feels sufficiently advised, but does counsel for defendant wish to make any further observation?

Mr. Starin: Not other than was made, Your Honor. We only want to call Your Honor's attention to the last question which counsel commented upon. There is evidence in the case now by the testimony of Mr. Cliffe and the testimony of Mr. Driskell, I believe, that the pipe in question was not discarded until Mr. Cliffe had directed it to be sold. I simply wanted to call that particular evidence to the Court's attention. That wasn't included in the offer of proof.

The Court: The Court is of the opinion that that does not make it material, that notwithstanding that we assume the convincing power claimed for that evidence, that there is a difference in the testimony as to when the pipe was disconnected from service of defendant in its extra hazardous occupation, that nevertheless for an appreciable length of time before this accident happened such disconnection became effective, and there is no evidence in the case which tends to support any claim or contention which might be advanced that as a matter of fact the pipe was still in service of the defendant in its extra hazardous industrial operations. The court does sustain the objection to the offer of proof, and to each and all of them.



Mr. Preston: We rest, Your Honor.

The Court: Before the Court accepts the final resting of the parties, I wish to call attention to the fact that Plaintiff's Exhibit 20 was not offered and it is not in evidence. It is the doctor's bill of Dr. Read.

Mr. A. L. Maslan: I believe it was agreed upon, was it not, counsel?

Mr. Preston: There was some communication at the bottom of it. I think I objected for that reason.

Mr. A. L. Maslan: The testimony of the doctor was [299] in the record that it was \$113.00. This exhibit may remain out.

The Court: Do you wish to withdraw it and have it returned to counsel who produced it?

Mr. Ben Maslan: We might just as well withdraw it and not encumber the record.

The Court: It is withdrawn and will now be returned to plaintiff's counsel.

Mr. A. L. Maslan: Do I understand there was a statement that that was the amount the doctor requested?

The Court: I think the doctor made some such testimony, although at first he did not recall he had sent a bill nor how much it contained. I think counsel's questions afterwards elicited from the witness substantially the same information which is now contained in the exhibit. Does anyone else think of anything? I believe counsel for defendant should in the presence of the jury, after the jury returns to the courtroom Friday morning, announce



that the defendant does rest, if that is your attitude.

Mr. Preston: Yes. We had already stated we would rest in the presence of the jury after this offer. If the Court wants me to say it again, I will.

The Court: If you do not say it, I wish you would remind me to do so. I would like for the jury to be [300] finally, officially told the taking of the testimony is completed.

Is there any reason why the Court should not be adjourned until Friday morning at 9:30? I will excuse counsel in the case until 8:30 Friday morning for the purpose of discussing instructions, but Court will be adjourned until 9:30 Friday morning. All those connected with this case may now be excused.

(At 4:30 o'clock, p.m., Wednesday, November 23, 1949, proceedings adjourned until 9:30 o'clock, a.m., Friday, November 25, 1949.)

Seattle, Washington; November 25, 1949,  
11:00 o'Clock, A.M.

The Court: For the information of all those present, I wish to say that the delay in the Court's opening this morning has been occasioned by the application of a certain rule of Court which requires the trial judge to discuss with counsel in the case on trial before a jury the requested instructions and the [301] Court's intended instructions.

Let the record show all of the jurors are present

in the case on trial, and likewise all parties on trial with their counsel, and that all of these persons are now present.

Does defendant rest?

Mr. Preston: Yes, Your Honor.

The Court: Is there any rebuttal?

Mr. Ben Maslan: No, Your Honor. Plaintiff rests at this time.

(Arguments made by counsel for plaintiff and defendant.)

The Court: This case is still not finally submitted to the jury, and you will reserve your discussions until later and also reserve your decision until later. The Court will after the lunch hour instruct you as to the law and will thereafter finally submit the case to the jury for its deliberation and verdict. You are now excused for the lunch hour, subject to the Court's previous admonitions.

Court is recessed until 1:00 o'clock.

(At 12:10 o'clock, p.m., Friday, November 25, 1949, proceedings recessed until 1:00 o'clock, p.m., Friday, November 25, 1949.) [302]

Seattle, Washington; November 25, 1949,  
1:00 o'Clock, P.M.

The Court: Let the record show that all of the jurors are present and all parties on trial with their counsel are present.

It now remains for the Court to instruct you as

to the law governing the case and for the Court to thereafter finally submit the case to the jury for its deliberation and verdict.

### COURT'S INSTRUCTIONS

Members of the Jury: You have heard the testimony and the arguments of counsel. After the Court instructs you, you will retire to the jury room to consider your verdict.

This is an action to recover damages for possible injuries which plaintiff alleges he sustained as a result of the negligence of the defendant in the respects stated in the complaint of the plaintiff. Plaintiff further alleges that he is a citizen of this state and that the defendant is a corporation organized under the laws of the state of Delaware and as such is a citizen [303] of the state of Delaware; that the defendant is qualified to do business in the state of Washington; that the plaintiff is an individual and also a citizen of the United States as well as the state of Washington, and these things just mentioned are all admitted by the defendant and no further proof or consideration need be given to those allegations in the plaintiff's complaint because of such admissions.

It might be interesting to the jury for me to make an aside statement that I had not intended to make, and that is that in this Court in this kind of a case the only way this Court could have jurisdiction to try it is because, first, it involves citizens of different states. That is what they call the

ground of diversity of citizenship. Second, it involves an amount claimed to be involved of more than \$3000 exclusive of interest and costs. Were it not for those two things, this Court would not have jurisdiction to try this case. It would have to have been brought and maintained in the State Court, but under federal law where any cause of action arises between citizens of different states, the Federal Court may under certain conditions have jurisdiction of that even though the cause of action does not, as it does not in this case, involve any federal law question. [304]

The plaintiff further alleges in his complaint that early in February, 1948, and for some years prior thereto the defendant was in the business of manufacturing chemicals and that it maintained and operated a manufacturing plant in Tacoma, Washington, where it produced and processed chemicals; that in the manufacturing and processing of those chemicals in that plant the defendant handled many chemicals capable of causing burns and severe injuries to persons who might come in contact with the chemicals; that in its plant it used a great number of iron pipes of various types and sizes through which defendant ran various types of chemicals in the processing and manufacturing of chemicals; that as the said pipe became worn, they were discarded as a part of the defendant's manufacturing plant and were replaced with other pipes; that during February, 1948, the defendant sold certain scrap iron to Frank Powser of Tacoma; that in-

cluded among that scrap iron was a large coil of pipe which the defendant had discarded from its manufacturing plant; that during February, 1948, employees of the said Frank Powser went to the defendant's Tacoma plant to accept delivery of that scrap iron sold to Frank Powser; that an employee of the defendant delivered the scrap iron which had been sold to Frank Powser, including the coil of pipe, to the [305] employees of Frank Powser who then loaded the scrap iron, including the coil of pipe, onto a truck which they had brought for that purpose and transported it to the salvage yard of Frank Powser in Tacoma; that upon arrival at that salvage yard of Frank Powser the coil of pipe was deposited in the Powser yard; that the coil of pipe at the time it was delivered to the employees of Powser contained sulphuric acid; that neither Powser nor any of his employees knew that the coil of pipe contained hidden within it sulphuric acid; that on the 20th day of February, 1948, the plaintiff was employed as a truck driver by B. Radinsky & Son, salvage dealers of Seattle; that on that day the plaintiff was directed by his employer to proceed to the salvage yard of Frank Powser in Tacoma to pick up a load of scrap iron and scrap pipe; that the plaintiff in a truck owned by his employer did proceed to the salvage yard of Frank Powser as directed and after arriving there was shown by employees of Frank Powser the scrap iron and scrap pipe which plaintiff was to load on his truck and transport to his employer's yard in Seattle;



that among the scrap iron to be loaded was the coil of pipe in question here; that the coil of pipe was laying on the ground in the salvage yard of Powser and in the same position as it had been when [306] first deposited in the Powser yard by Powser's employees at the time they had transported it from defendant's manufacturing plant; that plaintiff was at all times unaware that the coil of pipe contained the acid; that by means of a hoist the plaintiff loaded the coil of scrap pipe from the ground onto the truck; that for the purpose of placing the coil of pipe in a proper position on the truck and in order to move it a few inches, the plaintiff, using a maul, pounded on the pipe, when, without warning or notice to the plaintiff, a seam in the pipe opened and a pressurized stream of sulphuric acid which was in the pipe issued from it and struck the plaintiff on the face, arms, neck and eyes and covered a large portion of his clothing; that the force with which the acid spewed from the coil of pipe knocked the plaintiff from the truck to the ground; that the plaintiff suffered injuries as a result; that plaintiff was immediately rushed to the Tacoma General Hospital in Tacoma where he was forced to remain for 58 days.

Plaintiff further alleges that his injuries were caused by and were the direct and proximate result of the negligence of the defendant in that (a) the defendant failed to ascertain all sulphuric acid injurious to other persons on contact had been removed [307] from the coil of pipe before allowing



the coil of pipe to be removed from the premises of the defendant to be placed as scrap metal into the stream of commerce where it was certain to be handled by other persons unaware of its dangerous qualities; (b) that defendant failed to remove the sulphuric acid from the coil of pipe immediately after removing the pipe from its operating system; (c) that the defendant sold and delivered the coil of pipe containing the sulphuric acid, which is highly injurious to other persons upon contact, without having warned the persons to whom the pipe was sold and delivered of the presence of sulphuric acid in the coil of pipe.

The plaintiff further alleges that the sulphuric acid which issued from the coil of pipe as before alleged, upon coming into contact with his eyes, burned them to such an extent that he has suffered complete loss of vision in the left eye and almost total loss of vision in the right eye; that upon coming into contact with the rest of plaintiff's person, the sulphuric acid caused severe burns which have resulted in multiple scars, disfiguring the greater portion of plaintiff's face and neck and portions of his arms; that the injuries to the plaintiff have caused and are still causing and will cause in the future to the plaintiff excruciating pain [308] and extreme mental anguish and suffering; that the scars on plaintiff's face and body are extremely tender and continue to reopen, causing him continuous pain; that the plaintiff has been receiving medical treatment since the injuries and it will be

necessary for him to receive medical treatment in the future; that prior to the injuries sustained by the plaintiff as a result of defendant's negligence, the plaintiff was a strong and able bodied man in good health, with excellent vision, earning and capable of earning the sum of \$300 per month; that as a result of the injuries plaintiff sustained he has become totally and permanently disabled and disfigured; that the plaintiff will be permanently incapacitated and that his ability to follow any occupation has been permanently destroyed; that he has suffered intense pain and mental anguish in the past and will continue to so suffer in the future; that the plaintiff has been forced to expend large sums for medical and hospital services; that he is still being treated by doctors for his injuries and that he will be forced to expend large sums in the future for medical and hospital costs.

The defendant has denied all of the foregoing allegations of the plaintiff except as previously noted and except also that the defendant has admitted and does [309] admit the following allegations mentioned among the foregoing allegations in plaintiff's complaint, namely:

That defendant maintained and operated a manufacturing plant in Tacoma and that in the operation of that plant it used iron pipes; that as said pipes became worn they were discarded and replaced; that during February, 1948, the defendant sold scrap iron from its Tacoma plant, including a large coil of pipe which defendant had discarded

from its operating system; that the defendant delivered the scrap iron, including the coil of pipe, to employees of Frank Powser at the plant of defendant; that the plaintiff was employed in the capacity of truck driver by B. Radinsky & Son, salvage dealers of Seattle, Washington; and that on or about February 20, 1948, plaintiff was directed by his employer to pick up a load of scrap iron and scrap pipe in the salvage yard of Frank Powser in Tacoma; that the plaintiff proceeded to the salvage yard of Frank Powser in a truck owned by his employer; and that while in the act of loading this coil of scrap pipe which had been acquired by Frank Powser from the defendant, the plaintiff suffered injuries.

The plaintiff has the burden of proving all of the allegations of his complaint which are denied by the defendant by a fair preponderance of the evidence, as [310] I shall afterwards in these instructions define that term.

In addition to denying the certain allegations of the plaintiff previously mentioned as being denied, the defendant alleges as an affirmative defense that any injuries which may have been sustained by the plaintiff as a result of handling the coil of pipe were directly and proximately contributed to by plaintiff's own negligence. This allegation, in effect, of contributory negligence on plaintiff's part is denied by the plaintiff, and that denial of plaintiff of such affirmative allegation places upon the defendant the burden of proving that affirmative

defense by a fair preponderance of the evidence.

This is a civil case, and the party alleging in his pleadings any material fact which is not admitted by the opposing party has the burden of proof to establish such fact, which must be done by a fair preponderance of the evidence.

The basis of this action is negligence. The plaintiff is not entitled to recover merely because there was an accident. In order to recover, the plaintiff must prove by a fair preponderance of the evidence that the defendant was negligent in one or more particulars, as alleged in plaintiff's complaint, [311] and that plaintiff sustained injuries and damages as alleged and that such negligence was the proximate cause of such injuries and damages.

"Negligence" is the failure to exercise reasonable and ordinary care. By the term "reasonable and ordinary care" is meant that degree of care which an ordinarily careful and prudent person would exercise under the same or similar circumstances and conditions. "Negligence" consists in the doing of some act which a reasonably prudent person would not do under the same or similar circumstances, or in the failure to do something which a reasonably prudent person would have done under the same or similar circumstances and conditions. Negligence is not to be presumed, but must be established by proof the same as any other fact in the case.

The term "proximate cause" means an efficient

cause of an injury or loss without which such injury or loss would not have been sustained. It is that cause which in direct, unbroken sequence produces or directly contributes to producing the injury or loss complained of, and without which cause the injury or loss would not have occurred.

By the term "burden of proof" is meant the obligation to prove or establish a fact by a preponderance [312] of the evidence.

By the term "preponderance of the evidence" or "fair preponderance of the evidence" is meant that evidence on a particular matter which, when fully, fairly and impartially considered by you, has the greater weight with you, produces a stronger impression and is more convincing to you as to its truth than that to which it is opposed; and such preponderance of the evidence is not necessarily determined by the greater number of witnesses who may have testified for the one party or the other regarding such matter, since you may take into consideration all of the evidence in the case, no matter by which side produced.

The burden of proof in this case is on the plaintiff to prove all the material allegations in his complaint which are not admitted by defendant; and the burden of proof is on the defendant to prove the affirmative defense of his answer which is denied by plaintiff.

The defendant charges that the plaintiff was guilty of contributory negligence. "Contributory negligence" means negligence or want of care on



the part of a person suffering injury or damage, which materially and proximately contributed to cause the injuries complained of. It also may consist in doing some act [313] which a reasonably prudent person would not have done under the same or similar circumstances or conditions, or in failing to do something which a reasonably prudent person would have done under the same or similar circumstances. It is never presumed, but must be established by proof when, as in this case, it is denied. The burden of such proof in this case is on defendant.

The plaintiff is not required to prove each separate charge of negligence alleged in his complaint, but it will be sufficient to support recovery by him if plaintiff proves by a preponderance of the evidence and you find the defendant guilty of any one of such acts of negligence and that the same proximately resulted in injury and damage to the plaintiff as alleged by him.

You are instructed that while the party alleging any fact not admitted by the opposing party has the burden of establishing such fact by a preponderance of the evidence, it is not essential that it be established by evidence introduced by the party having such burden of proof, but it may be established in whole or in part by evidence introduced by the opposite party.

You are instructed that under the evidence in this case, the plaintiff has legally elected to bring an [314] action against the defendant Pennsylvania



Salt Manufacturing Company of Washington, a Delaware corporation. You are therefore instructed to disregard entirely any evidence as to or mention of the Workmen's Compensation Act or any rights the plaintiff may have thereunder.

One who has in his possession or under his control a force or substance dangerous in character is bound to take precautions consistent with the danger to prevent an injury being done thereby. The law exacts of one who puts a dangerous force in motion or abroad that he shall control it with a skill and care proportioned to the danger created. A higher degree of care and vigilance is required in dealing with a dangerous agency than in dealing with non-dangerous agencies in the ordinary affairs of life or business which involve little or no risk of injury to persons or property. While no absolute standard of care applicable to all cases in dealing with such dangerous agencies can be prescribed, yet every reasonable precaution suggested by experience and the known dangers of the subject ought to be taken in each specific case.

If, therefore, you find from a preponderance of the evidence in this case that the coil of pipe sold by defendant contained a substance dangerous to the tissues of the human body and that defendant knew or by the exercise of reasonable and ordinary care should have known of the presence thereof, but failed to take precautions consistent with the danger to prevent injury to others, then in that event the defendant would be guilty of negligence

and defendant would be liable for any injuries and damages sustained by plaintiff as a proximate result of such negligence, unless you find plaintiff was guilty of negligence proximately contributing to the complained of occurrence and the resulting injuries to plaintiff.

You are instructed that if you find from a preponderance of the evidence in this case that the plaintiff at the times in question did not use reasonable care for his own protection and well being, and that such failure on his part directly and proximately contributed to cause the complained of occurrence and plaintiff's resulting injuries, then plaintiff cannot recover and your verdict in that event should be for the defendant, regardless of whether or not the defendant was also negligent.

Respecting foreseeability as bearing upon defendant's liability, in this case, the law is that defendant is liable for the natural, probable and foreseeable effects of defendant's negligence, and only for those. If the act is one which the party ought, in the exercise of ordinary care, to have anticipated was liable to result in injury to others, then he is liable for any injury proximately resulting from it, although he could not have anticipated the particular injury which did happen. Consequences which follow in unbroken sequence without an intervening efficient cause from the original negligent act are natural and proximate; and for such consequences the original wrong doer is re-

sponsible, even though he could not have foreseen the particular result which did follow.

The defendant corporation can act only through its agents and employees and is responsible for the acts and omissions of such agents and employees within the scope of their authority. If defendant's agents or employees had knowledge or in the exercise of reasonable and ordinary care should have had knowledge of the presence of a dangerous substance in the coil of pipe in question, then in contemplation of law the defendant knew or should have known of such fact.

If you find from a preponderance of the evidence that the proximate cause of plaintiff's injuries was solely the negligence of plaintiff himself, then your verdict must be in favor of the defendant. [317]

If you believe, after full consideration of all of the facts and circumstances as disclosed by the evidence in this case, that what happened was a mere accident, which was under all the circumstances unavoidable and was not proximately caused by negligence, if any, on the part of the defendant, then there can be no recovery in this action and your verdict must in that event be for the defendant.

The plaintiff, in order to prevail in this action, must prove by a preponderance of the evidence or reasonable inference there from that defendant was negligent in one or more of the particulars charged in plaintiff's complaint. If in order to find an act of negligence on the part of defendant

you are required to resort to speculation, surmise or conjecture, then plaintiff cannot recover, and in that event your verdict should be for the defendant.

You are instructed that if you find from the evidence that at the time of the delivery of the coil of pipe to employees of Frank Powser, the employees of the defendant did not know or by the exercise of reasonable and ordinary care would not have known of the existence of any dangerous or injurious substance contained in that pipe, then your verdict should be for the defendant.

If you find for the plaintiff, you will assess his damages in such an amount as will fully and fairly compensate him for his injuries, for such impairment of his vitality or faculties, if any, as he has suffered in the past or is reasonably certain to suffer in the future, for such loss of earnings, if any, as he has sustained in the past or is reasonably certain to sustain in the future, for such pain and suffering and mental anguish, if any, as he has endured in the past or is reasonably certain to endure in the future, and for such expenses, if any, as he has reasonably and necessarily incurred in the past and will so incur in the future for the services of doctors, hospitals and medical care, but in no event shall your verdict exceed the total aggregate sum of \$250,000.

In assessing the compensation to be paid, if any, for alleged future pain and suffering and mental anguish or for future loss of earnings or for the

future impairment of physical vitality or faculties, I instruct you that you cannot indulge in speculation or uncertainties, but may award damages only for such matters as are reasonably certain to happen in the future as disclosed by the evidence.

The purpose of the law is not to punish the defendant, in case you find it liable, but to fairly and fully compensate the plaintiff. The law has not furnished us with any fixed standard by which to measure pain and suffering, mental anguish or the impairment of one's physical vitality or faculties, nor by which to measure the compensation to be paid for such things. With reference to these matters, you must be guided by your own experience and judgment based upon the evidence in the case.

Evidence has been admitted regarding the normal life expectancy of a man of Oscar Haynes' age and the cost of purchasing certain annuities. This evidence was not admitted as a basis for a mathematical computation of damages, but was offered and admitted solely to assist you, when considered with all the evidence in the case, in calculating the plaintiff's damages in the event you should find a verdict in his favor. The normal life expectancy of a man of the age of 23 years is 43.88 years. The fact that a man of the age of 23 years might normally be expected to live 43.88 years is not to be accepted as proof that Oscar Haynes will live that length of time or would be able to pursue his vocation as a truck driver or any other vocation for that length of time. Neither is it to be



accepted as proof that he would have died at the expiration of that time. The mortality tables from which this life expectancy data was taken have been compiled by life insurance companies from a study of statistics affecting their own policy holders. This data is all based upon the assumption that the man is an insurable risk in good health. In determining the probable life expectancy of Oscar Haynes or the number of years that he would probably have been able to pursue his occupation, you must consider all of the evidence in the case bearing upon the condition of his health, his habits of life, the nature of his occupation and all other circumstances disclosed by the evidence which may seem to you to have a bearing upon the probable duration of his useful working life.

The fact that the Court has instructed you upon the rules governing the measure of damages in this case is not to be taken by you as an indication on the part of the Court that it believes or does not believe that the plaintiff is or is not entitled to recover damages in this case. Such instruction is given to guide you in arriving at the amount of your verdict only in the event that you find from the evidence and under the instructions given you by the Court that the plaintiff is entitled to recover damages. If from the evidence and under the instructions given you by the Court, you find that the plaintiff is not entitled to recover, then you are to entirely disregard the instructions which have been given you concerning the measure of damages.



You are the sole and exclusive judges of the evidence and of the credibility of the several witnesses and of the weight to be attached to the testimony of each. In weighing the testimony of a witness, you have a right to consider his demeanor upon the witness stand, the apparent fairness or lack of fairness, the apparent candor or lack of candor of such witness, the reasonableness or unreasonableness of the story such witness relates, and the interest, if any, you may believe a witness feels in the results of the trial, and any other fact or circumstance arising from the evidence which appeals to your judgment as in any wise affecting the credibility of such witness, and to give to the testimony of the several witnesses just such degree of weight as in your judgment it is entitled to.

You will be slow to believe that any witness has testified falsely in the case, but if you do believe that any witness has wilfully testified falsely to any material matter, then you are at liberty to disregard the testimony of such witness entirely, except insofar as the same may be corroborated by other credible evidence in the case.

Plaintiff having testified as a witness, the foregoing relating to credibility of witnesses and weight of testimony applies to him and his testimony, as well as to all the other witnesses in the case.

It is the duty of the Court to instruct you as to the law governing the case, and you must take such instructions to be the law. You will consider such instructions as a whole and will not select any one

of them and place undue emphasis on that one instruction.

You will consider all evidence admitted by the Court and now before you, and you will disregard all evidence and exhibits offered but not admitted by the Court and all evidence stricken by the Court.

In this connection, you are instructed that you are not called upon to pass upon objections and exceptions made or taken by counsel and you should not allow the making of objections and taking of exceptions by counsel to influence or confuse you.

It is your duty to weigh the evidence calmly and dispassionately, to regard the interests of the parties to this action as the interests of strangers, to decide the issue upon the merits and to arrive at your conclusion without any consideration of the financial ability of the one or the necessities of the other, and without regard to what effect, if any, your verdict may have upon the future welfare of the parties.

You shall not permit sympathy or prejudice in favor of or against either party or their respective attorneys to have any place in your deliberations, for all persons are equal before the law and all are entitled to exact justice.

Statements, if any, by counsel or the Court unsupported by your own recollection of the evidence, you will disregard.

While it would be proper for me as the trial judge to analyze the testimony and to give you my understanding of it, which, however, would not be

binding upon you, my purpose is not to intimate to you any opinion I may have of any fact or the weight of any evidence, and if I refer to or have referred to any facts in the case, it will not be and has not been for the purpose of indicating any opinion I may have of the facts, but simply to illustrate some proposition of law which is involved with the facts.

If you can conscientiously do so, you are expected to agree on a verdict in this case. The matter being submitted to you for your consideration is an important and serious one, as are all cases submitted to juries. You should bring to your consideration of this case your earnest and honest endeavor to solve it justly and properly with due regard to the rights of both the plaintiff and the defendant.

Let me say to you that you should freely consult with one another in the jury room. If any one of you should be convinced that your view of the case is erroneous, do not be stubborn and do not hesitate to abandon your own view under such circumstances. On the other hand, it is entirely proper to adhere to your own view, if, after a full exchange of ideas, you still believe you are right.

You must not in arriving at the amount of your verdict resort to the so-called pooling plan or scheme. Such scheme is for each juror to write down the amount he thinks should be awarded, then to add up those amounts and divide that sum by 12 and thus fix the amount of your verdict. Do not do that as that would be illegal, for your ver-

dict should be based upon the evidence and the law as given to you by the Court, and not upon such or any method of chance determination of your verdict.

I might add this further thought to the jurors by way of an explanation of the present stage of the trial. Counsel in the case on both sides have brought before the Court and jury all of the admissible evidence that they know of to properly enable the jury and the Court to perform their respective functions. The Court has fully instructed the jury on the law applicable to the case. It is not known to the attorneys or the trial judge what more could be done to properly enable the jury to perform its duty. You now have all of the means necessary to a decision.

In this Court, the instructions in written form are not sent to the jury room. Likewise, written transcripts of the oral testimony from the witness stand are not sent to the jury room. It is for the jury to remember the evidence and the Court's instructions.

Immediately upon your retiring, you will select one of your number as your foreman. The pleadings in the case will not be sent to the jury room as the issues are simple and have been sufficiently explained to you in the arguments of counsel, in the evidence and in the Court's instructions and by other means during the course of the trial. You will take with you to the jury room the exhibits in the case, and you will be given two forms of

verdicts, one for the plaintiff and one for the defendant. These forms have been prepared by the clerk of the Court for your convenience.

When you reach your verdict, if the same is for the plaintiff, you will in that event fill in the proper form of verdict the amount of recovery you allow the plaintiff and have your foreman sign that verdict. In that connection, you will see from the verdict form the place left blank for you to fill in in case you use that form of verdict. I suggest that you write down the information to be put in those blank places on a separate piece of paper and see that you get it accurately written down on a separate piece of paper, in case you find it necessary to use this form of verdict by reason of the verdict which you have found, and then transfer from that trial sheet of paper the accurate figures into the verdict form, and then you will thereby insure against mistake and erasures. That has been said only in case your verdict as found requires you to use the verdict form which has on it the filling in of such blank spaces.

If you find for defendant, you will use the appropriate form provided therefore and have your foreman sign that verdict. You will discard the form of verdict not used.

It is necessary that all of you agree on your verdict, and when so agreed upon, you will cause your foreman to sign your verdict and return with it into open court.

Counsel, have I overlooked anything?

If there are any exceptions to be noted by coun-



sel, I shall, upon being so advised, temporarily excuse the jury for that purpose as the rules provide. Are there any exceptions to be so noted?

Mr. Preston: Yes, we have one, Your Honor.

The Court: The rules provide that counsel may do this in the absence of the jury, and the law places upon counsel the duty of doing it in that manner, so at this immediate time when the jury is excused from the jury box, which you are about to be, you will give no further thought to this case. During this recess, refrain from discussing it among yourselves. Reserve your decision entirely until after you have been brought back to the courtroom and until after the Court has finally submitted the case to the jury for its deliberation and verdict. The case has not yet been so submitted. Do not begin your deliberations and do not begin your discussions of the case. The jury will now temporarily retire.

(Jury retires.)

The Court: Does the plaintiff have any exceptions which the plaintiff wishes to note?

Mr. Ben Maslan: Yes, Your Honor. We except to the failure of the Court to give plaintiff's proposed instruction No. 2, which reads as follows: "You are instructed that the injuries of the plaintiff Oscar Haynes occasioned by sulphuric acid on or about February 20, 1948, while loading a coil of pipe discarded from the plant of the defendant Pennsylvania Salt Company, were caused by the negligence of the defendant, and it is your duty



to bring in a verdict in favor of the plaintiff Oscar Haynes against the defendant company for the damages he sustained on account of such injuries.”

In effect, Your Honor, that instruction calls for a directed verdict on the legal portion of the cause, namely, that the Court should find as a matter of law that the defendant company was negligent and leave to the determination of the jury solely the question of the damages for the injuries. Our position in that respect is that we have clearly, without any contradiction and without any reasonable minds, legally speaking, being able to differ on the subject, established the negligence of the defendant in that contrary to well established law they sold and put into the stream of commerce this inherently dangerous object, knowing or reasonably having to know that someone might be injured thereby. We feel that the matter should not have been submitted to the jury but that the Court as a matter of law should have told the jury that the defendant was negligent.

The Court: That exception is allowed.

Mr. Ben Maslan: Your Honor, we except to the Court's failure to give what has been denominated in the plaintiff's proposed instructions as Instruction No. 11, which reads as follows: “You are instructed that if you find that the defendant sold the coil of pipe to Frank Powser and knew or should have known that it contained sulphuric acid and that defendant could reasonably have antici-

pated that someone unaware of the pipe's dangerous condition would be burned by the acid, and that defendant delivered the pipe to Frank Powser without giving notice of the pipe's dangerous qualities, then you must find that the defendant was guilty of negligence. And if you find that the plaintiff was injured as a proximate result of that negligence, your verdict must be for the plaintiff."

Neither that nor anything that covers the question of failure of giving notice as an element of negligence was given by the Court, and that is a clear statement of the law in that regard, and the jury should have been instructed either exactly this way, or some other instruction incorporating this failure to give notice as negligence should have been given.

The Court: Allowed.

Mr. Ben Maslan: I would like Mr. Hanan to phrase the other exception that we have. He is a little more familiar with the particular legal point involved.

Mr. Hanan: I think it is denominated Instruction No. 8 in defendant's requested instructions, Your Honor. I believe Your Honor gave it in substance in these terms, that you are instructed that if you find from the evidence that at the time of delivery of the coil of pipe to employees of Frank Powser, the employees of the defendant did not know or in the exercise of reasonable and ordinary care could not know of the existence of any dangerous or injurious substance, then your verdict should be for the defendant.

We except to that portion of the instruction which read, "in the exercise of reasonable and ordinary care could not know," for this reason; we feel that the instruction should have read, in the exercise of reasonable care. Under the circumstances, inasmuch as following the said phrase there was reference to a dangerous and injurious substance, we feel that the use of the words "ordinary care" is in contradiction, or perhaps not in exact contradiction, but it casts a doubt as to the exact standard of care necessary when handling injurious substances, and we feel that the use of the words "ordinary care" negatives any ideas the jury might get that in handling any dangerous substance, that reasonable care under the circumstances amounts to greater care than is ordinarily given to substances which are not dangerous. I think that is the sum and substance of our objection to that instruction.

A second objection we have to that instruction is this, we feel that under the evidence there is no doubt, reasonable minds cannot differ on the fact that the employees of the defendant knew or should have known of the existence of that sulphuric acid in that pipe; therefore, there being no question but what they should have known what it was, and to leave that point in doubt in the minds of the jury and allow them to pass upon it——

The Court: Allowed. Is that all the exceptions to be noted by the plaintiff?

Mr. Ben Maslan: That is correct, Your Honor.

The Court: Defendant may now note its exceptions.

Mr. Preston: Your Honor, the defendant excepts to the refusal of the Court to give its requested Instruction No. 1, which is simply a peremptory instruction to the jury that they return a verdict to the Court in favor of the defendant on the ground and for the reason that under the evidence in the case it appears without question that the plaintiff has no common law cause of action, or action permitted by Statute, but is restricted in his remedy to the Workman's Compensation Act of the State of Washington.

The Court: Allowed. Bring in the jury.

All of the jurors have returned to their places as before.

The clerk will now swear the bailiffs.

(Bailiffs sworn.)

The Court: What I am about to say will apply only to the 12 principal jurors and will not apply to the alternate juror. The Court instructs the jury that you will now retire to consider your verdict, being hereafter in the conduct of the bailiffs, and you will hereafter remain together at all times until discharged by the Court from further consideration of this case. The case is now fully and finally submitted to the jury for its deliberations and verdict. You will now retire.

(Jury retires.)

(At 2:15 o'clock p.m., Friday, November 25, 1949, trial proceedings concluded.)

CERTIFICATE

I, Patricia Stewart, do hereby certify that I am official court reporter for the above-entitled court, and as such was in attendance upon the hearing of the foregoing matter.

I further certify that the above transcript is a true and correct record of the matters as therein set forth.

/s/ PATRICIA STEWART,  
Official Court Reporter.

[Endorsed]: Filed March 9, 1950.

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[Title of District Court and Cause.]

CERTIFICATE OF CLERK OF U. S. DISTRICT COURT TO RECORD ON APPEAL.

United States of America,  
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Sub-division 1 of Rule 11 as Amended of the United States Court of Appeals for the Ninth Circuit, and Rule 75 (o) of the Federal Rules of Civil Procedure and designation of counsel, I am transmitting herewith all of the original pleadings on file and of record in said cause in my office at Seattle, as set forth below, and that said pleadings, together with Plaintiff's Exhibits Num-

bered 1 to 19 inclusive, 21, and 23 to 33 inclusive, offered in evidence at the trial of said cause constitute the record on appeal from the Judgment for Plaintiff filed and entered December 12, 1949, to the United States Court of Appeals for the Ninth Circuit, to wit:

1. Complaint.
2. Marshal's Return on Summons.
3. Stipulation re Contents of Pipe.
4. Appearance of Attorneys for Defendant.
5. Answer of Defendant.
6. Marshal's Return on Subpoena (Hubbard).
7. Praecipe for Subpoena, Powser & Radinsky & Son.
8. Plaintiff's Requested Instructions.
9. Defendant's Requested Instructions.
10. Marshal's Return on Subpoena Powser.
11. Marshal's Return on Subpeona Radinsky & Son.
12. Plaintiff's Memorandum Brief.
13. Defendant's Trial Brief.
14. Marshal's Return on Subpoena Miller & 6.
15. Marshal's Return on Subpoena Cliffe & 1.
16. Verdict for Plaintiff.
17. Plaintiff's Memo of Costs & Disbursements.
18. Notice of Taxation of Costs.
19. Motion for New Trial of One Issue.
20. Notice of Presentation of Judgment.



21. Judgment on Jury Verdict.

22. Notice of Appeal to the U. S. Court of Appeals.

23. Bond on Appeal.

24. Order Enlarging Time to File Transcript of Record on Appeal.

25. Reporter's Transcript of Proceedings at Trial.

26. Praecept and Designation for Record.

In Witness Whereof, I have hereunto set my hand and affixed the official seal of said District Court at Seattle, this 9th day of March, 1950.

MILLARD P. THOMAS,  
Clerk.

[Seal] By /s/ TRUMAN EGGER,  
Chief Deputy.

[Endorsed]: No. 12499. United States Court of Appeals for the Ninth Circuit. Pennsylvania Salt Mfg. Co., of Washington, a Corporation, Appellant, vs. Oscar Virgil Haynes, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed March 11, 1950.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals for the  
Ninth Circuit  
No. 12499

OSCAR VIRGIL HAYNES,

Respondent,

vs.

PENNSYLVANIA SALT MFG. CO. of Washing-  
ton, a Delaware corporation,  
Appellant.

STATEMENT OF POINTS ON WHICH  
APPELLANT INTENDS TO RELY

Comes now the appellant and pursuant to Rule 19 (6) of the rules of the above entitled court does hereby set forth the point on which it intends to rely on the appeal as follows, to wit:

1. The District Court erred in its ruling that respondent had a cause of action against appellant notwithstanding the provisions of § 7675 Rem. Rev. Stat. of Washington, upon the ground that under said statute the only remedy available to respondent was against the Workmen's Compensation Fund of the State of Washington, said ruling being the basis of (a) the District Court's sustaining of respondent's objection to appellant's offer of proof of facts in support of its first affirmative defense;

(b) the District Court's refusal to peremptorily instruct a verdict for appellant, and (c) the District Court's denial of appellant's motion for a new trial of the issue raised by appellant's first affirmative defense.

PRESTON, THORGRIMSON &  
HOROWITZ,

Attorneys for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed March 13, 1950.

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[Title of Court of Appeals and Cause.]

#### DESIGNATION OF PARTS OF RECORD

Comes now appellant and pursuant to Rule 19 (b) of the rules of the above entitled court, hereby designates the following as all of the record which is material to the consideration of the appeal:

1. Respondent's complaint.
2. Appellant's answer.
3. Transcript of proceedings at trial.
4. Exhibits introduced at trial.
5. Appellant's requested instructions.
6. Court's instructions.
7. Verdict of jury.
8. Appellant's motion for new trial of one issue.

9. Order overruling appellant's said motion for new trial of one issue.

10. Judgment.

11. Notice of appeal.

12. Appeal bond.

13. Order extending time to file transcript and docketing of cause.

PRESTON, THORGRIMSON &  
HOROWITZ,

Attorneys for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed March 13, 1950.

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[Title of Court of Appeals and Cause.]

DESIGNATION OF ADDITIONAL  
PARTS OF RECORD

Comes now respondent and hereby designates the following additional parts of the record as being material to the consideration of the appeal:

Stipulation Allowing Amendment to Complaint.

MASLAN, MASLAN & HANAN,  
Attorneys for Respondent.

Receipt of copy acknowledged.

[Endorsed]: Filed March 17, 1950.